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122

REPORTS OF CASES

IN THE

SUPREME COURT OF NEBRASKA.

SEPTEMBER TERM, 1908—JANUARY TERM, 1909.

VOLUME LXXXIII.

HARRY C. LINDSAY,

OFFICIAL REPORTER.

PREPARED AND EDITED BY

HENRY P. STODDART,

DEPUTY REPORTER.

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DEC 23 1909

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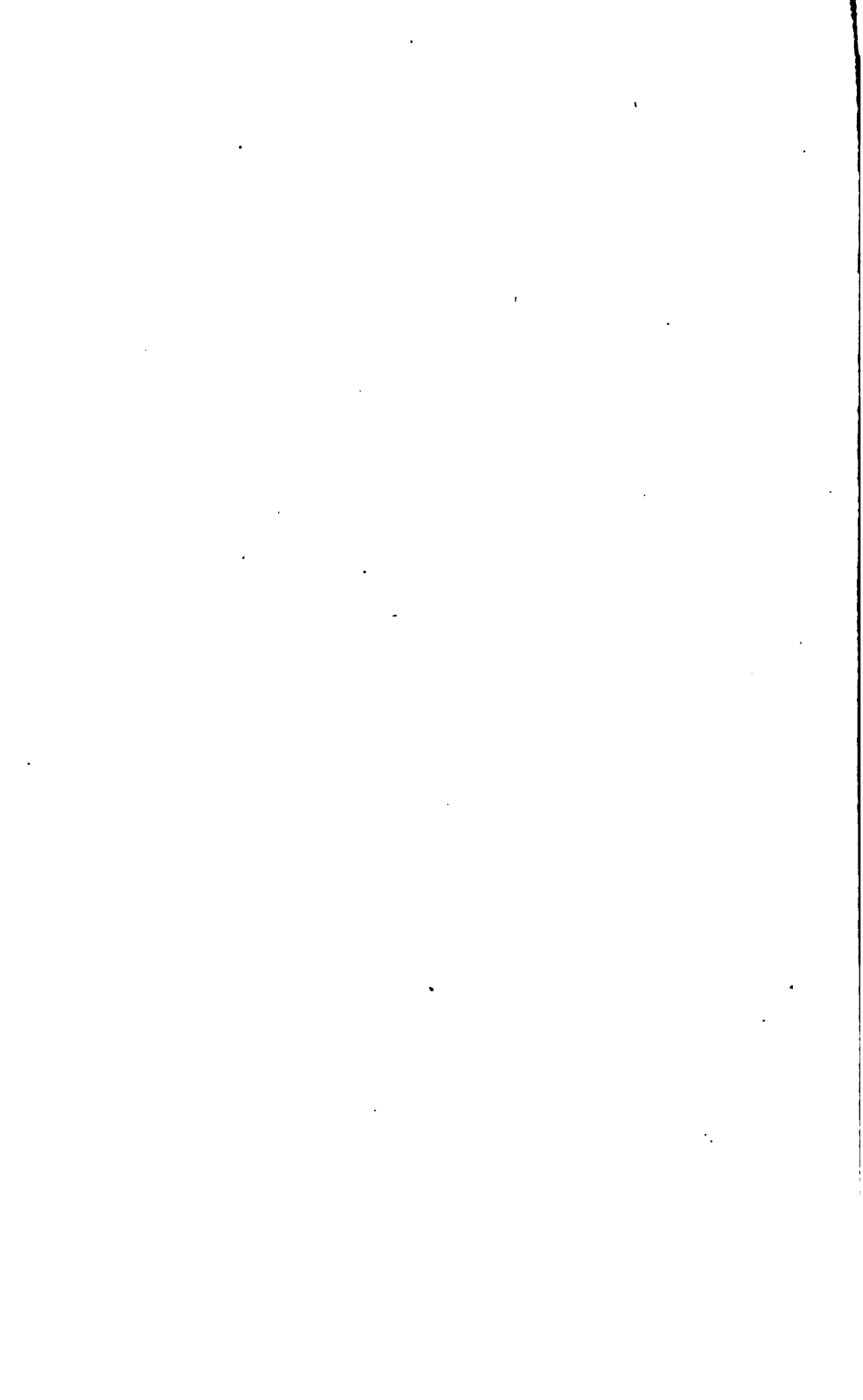


TABLE OF CASES REPORTED.

	PAGE
Acken v. Tinglehoff.....	296
Acme Harvester Co., Herpolsheimer v.....	53
Adams v. Fisher.....	686
Advance Thresher Co., Duval v.....	593
Andersen v. Borgaard.....	8
Andersen, In re Estate of.....	8
Armstrong v. Greenwood.....	429
Atchison & N. R. Co., Hinton v.....	835
Aulabaugh, Helwig v.....	542
Austin, Taylor v.....	581
Ayers v. Citizens Railway Co.....	26
Ba'llard v. Cerney.....	606
Bancher v. Lowe.....	801
Bankers Life Ins. Co., Carter v.....	810
Bankers Union of the World, Johnson v.....	48
Barnes, In re.....	443
Barnes v. State.....	443
Bartholomew, Shannon v.....	821
Bauer, Peterson v.....	405
Becker, Bolton v.....	21
Benedict v. Minton.....	782
Bergeron v. Modern Brotherhood of America.....	419
Bixby, Leach v.....	845
Blust, Dunkin v.....	80
Blust, Rasmussen v.....	678
Boesen v. Omaha Street R. Co.....	378
Bolton v. Becker.....	21
Bonacum v. Manning.....	417
Borchers, First State Bank v.....	530
Borgaard, Andersen v.....	8
Borland, Davis v.....	281
Bradley & Co. v. Matley.....	589
Brandt, State v.....	656
Broadwell, Yeiser v.....	302
Brown, Jesse v.....	311
Brown, Whedon v.....	130
Buckminster, Frederick v.....	135
Buerstetta v. Buerstetta.....	287

	PAGE
Buerstetta, In re Estate of.....	287
Buffalo County v. Kearney County.....	550
Burnham v. Chicago, B. & Q. R. Co.....	183
Busch, Fink v.....	599
Butler County, Colfax County v.....	803
Button, In re.....	636
Cadwell v. Smith.....	567
Callahan v. State.....	246
Carnahan, Smith v.....	667
Carter v. Bankers Life Ins. Co.....	810
Case Threshing Machine Co., Ord Hardware Co. v.....	353
Cass County v. Sarpy County.....	435
Caulton v. Pope.....	723
Cerney, Ballard v.....	606
Cerny v. Paxton & Gallagher Co.....	88
Chase, Whitcomb v.....	360
Chicago, B. & Q. R. Co., Burnham v.	183
Chicago, B. & Q. R. Co., Davis v.	611
Chicago, B. & Q. R. Co., Fee v.	307
Chicago, B. & Q. R. Co., Moran v.	680
Chicago, B. & Q. R. Co., Shults v.	272
Chicago, B. & Q. R. Co., Smith v.	387
Chicago House Wrecking Co. v. City of Omaha.....	179
Chicago & N. W. R. Co., Hart v.	652
Chicago & N. W. R. Co., State v.	518
Chicago & N. W. R. Co., State v.	524
Chicago, R. I. & P. R. Co. v. Erskine	95
Chicago, R. I. & P. R. Co. v. Latta	104
Chicago, R. I. & P. R. Co. v. Welch	106
Chicago, R. I. & P. R. Co. v. Welch	110
Citizens Bank v. Fredrickson.....	755
Citizens Railway Co., Ayers v.....	26
City of Omaha, Chicago House Wrecking Co. v.....	179
Clopine, Shepherdson v.....	764
Close, Estate of, Russell v.....	232
Colfax County v. Butler County.....	803
Collister v. Ritzhaupt.....	794
Cooper Wagon & Buggy Co. v. Irvin.....	832
Curry v. Rohrer.....	469
Curtis-Baum Co. v. Lang.....	728
Davis v. Borland.....	281
Davis v. Chicago, B. & Q. R. Co.....	611
Deffenbaugh, Hoover v.....	476
Dill, George v.....	825
Dillon, Selfert v.....	322

TABLE OF CASES REPORTED.

ix

	PAGE
Dittberner, Teske v.....	701
Driffkorn, Stanton v.....	36
Dudgeon, State v.....	371
Dunkin v. Blust.....	80
Dunn, McCullough v.....	591
Duval v. Advance Thresher Co.....	593
Dye, Glassey v.....	615
Eastwood v. Klamm.....	546
Ellick, Livingston v.....	841
Emerson v. State.....	663
English, Meyer v.....	163
Erskine, Chicago, R. I. & P. R. Co. v.....	95
Estate of Close, Russell v.....	232
Estate of Keegan v. Welch.....	166
Estate of Panko, Harms v.....	145
Etmund v. Etmund.....	151
Fee v. Chicago, B. & Q. R. Co.....	307
Fink v. Busch.....	599
First Nat. Bank v. McClanahan.....	706
First Nat. Bank, Stires v.....	193
First State Bank v. Borchers.....	530
Fisher, Adams v.....	686
Fitch v. Martin.....	124
Fletcher v. Fletcher.....	156
Fletcher, In re Estate of.....	156
Flynn, Roberts v.....	318, 321
Foster v. State.....	264
Fouse v. State.....	258
Frederick v. Buckminster.....	135
Frederick, In re Estate of.....	318, 321
Fredrickson, Citizens Bank v.....	755
Freitag v. Rohrer.....	469
Fuller, State v.....	784
Fullmers, Ververka v.....	6
Funk, Killen v.....	622
Gage County, Pethoud v.....	497
Gates v. Tebbetts.....	573
Gureau v. Van Patten.....	64
George v. Dill.....	825
Gerson v. Gutru.....	718
Glassey v. Dye.....	615
Gilder & Son v. Pankonin.....	204
Gene v. State.....	84
Greenwood, Armstrong v.....	429

	PAGE
Greenwood, In re Estate of.....	429
Gutru, Gibson v.....	718
Gutru v. McVicker.....	555
Hallowell, Sloan v.....	762
Hammond, In re.....	636
Harms v. Estate of Panko.....	145
Hart v. Chicago & N. W. R. Co.....	652
Hart v. Knights of the Maccabees of the World.....	423
Hartford Fire Ins Co., Stanisics v.....	768
Hastings Brewing Co., Rohrer v.....	111
Hauptman, Pike v.....	172
Hayward, Watson v.....	211
Heidemann v. Noxon.....	175
Helwig v. Aulabaugh.....	542
Herpolsheimer v. Acme Harvester Co.....	53
Hibner v. Wilson.....	252
Higgins v. Supreme Castle of the Highland Nobles.....	504
Hinton v. Atchison & N. R. Co.....	835
Hocter, State v.....	690
Hoover v. Deffenbaugh.....	476
Howell v. State.....	448
Hruby v. Sovereign Camp, Woodmen of the World.....	800
In re Barnes.....	443
In re Button.....	636
In re Estate of Andersen.....	8
In re Estate of Buerstetta.....	287
In re Estate of Fletcher.....	156
In re Estate of Frederick.....	318, 321
In re Estate of Greenwood.....	429
In re Estate of Jones.....	841
In re Estate of Manning.....	417
In re Estate of Panko.....	145
In re Estate of Pope.....	723
In re Estate of Wilson.....	252
In re Hammond.....	636
In re Watson.....	211
Irvin, Cooper Wagon & Buggy Co. v.....	832
Jarmine v. Swanson.....	751
Jesse v. Brown.....	311
Johannes v. Thayer County.....	689
Johnson v. Bankers Union of the World.....	48
Johnson, Worrall Grain Co. v.....	349
Jones, In re Estate of.....	841
Karr, Souchek v.....	649

TABLE OF CASES REPORTED.

xi

	PAGE
Kearney County, Buffalo County v.....	550
Keegan, Estate of, v. Welch.....	166
Keeling v. Pommer.....	510
Kendall v. Uland.....	527
Kennison v. State.....	391
Key, Willard v.....	850
Killen v. Funk.....	622
Kimmerly v. McMichael.....	789
Kirkpatrick v. Kirkpatrick.....	578
Klamm, Eastwood v.....	546
Kleen, Mote v.....	585
Knights of the Maccabees of the World, Hart v.....	423
Krivohlavek, Woods v.....	22
Lang, Curtis-Baum Co. v.....	728
Larsen v. Sanzierl.....	384
Lashmett v. Prall.....	732
Latta, Chicago, R. I. & P. R. Co. v.....	104
Layton v. Sarpy County.....	628
Leach v. Bixby.....	845
Lewis v. McDonald.....	694
Lillie v. State.....	268
Lincoln Traction Co., Woods v.....	23
Livingston v. Ellick.....	841
London, McCarn v.....	201
Lowe, Banchor v.....	801
Luther v. State.....	455
McCandless, Nebraska Central Building & Loan Ass'n v.....	536
McCarn v. London.....	201
McCauley v. State.....	431
McClanahan, First Nat. Bank v.....	706
McCullough v. Dunn.....	591
McDonald, Lewis v.....	694
McGillin, South Omaha Nat. Bank v.....	439
McMichael, Kimmerly v.....	789
McVicker, Gutru v.....	555
Mahoney v. Salsbury.....	488
Manning, Bonacum v.....	417
Manning, In re Estate of.....	417
Martin, Fitch v.....	124
Matley, Bradley & Co. v.....	589
Meyer v. English.....	163
Miller, Montgomery v.....	625
Miller, Morris v.....	218
Miner v. Morgan.....	400
Minton, Benedict v.....	782

	PAGE
Minton-Woodward Co., Talmage v.....	29
Modern Brotherhood of America, Bergeron v.....	419
Montgomery v. Miller.....	625
Moran v. Chicago, B. & Q. R. Co.....	680
Morgan, Miner v.....	400
Morrill, Powell v.....	119
Morris v. Miller.....	218
Mote v. Kleen.....	585
Mott v. State.....	226
Murphy, St. Vincent's Parish v.....	630
Nebraska Central Building & Loan Ass'n v. McCandless.....	536
Nebraska Telephone Co., Olson v.....	735
Nelson, Shelbley v.....	501
Nelson v. Webster.....	169
Neylon v. Rohrer.....	469
Nichols & Shepard Co. v. Steinkraus.....	1
Noxon, Heidemann v.....	175
O'Brien Co. v. Omaha Water Co.....	71
Olson v. Nebraska Telephone Co.....	735
Omaha, City of, Chicago House Wrecking Co. v.....	179
Omaha & C. B. Street R. Co., Stewart v.....	97
Omaha Street R. Co., Boesen v.....	378
Omaha Umbrella Mfg. Co., Singer Sewing Machine Co. v.....	619
Omaha Water Co., O'Brien Co. v.....	71
Ord Hardware Co. v. Case Threshing Machine Co.....	353
Panko, In re Estate of.....	145
Pankonin, Gordier & Son v.....	204
Paxton & Gallagher Co., Cerny v.....	88
Peter, Vandewege v.....	140
Peterson v. Bauer.....	405
Pethoud v. Gage County.....	497
Phillips, Williams v.....	105
Pike v. Hauptman.....	172
Pommer, Keeling v.....	510
Pope, Caulton v.....	723
Pope, In re Estate of.....	723
Poston v. State.....	240
Powell v. Morrill.....	119
Prall, Lashmett v.....	732
Pulver v. State.....	446
Quinby v. Union P. R. Co.....	777
Radford v. Wood.....	773
Rasmussen v. Blust.....	678
Reed v. Village of Syracuse.....	713

TABLE OF CASES REPORTED.

xiii

	PAGE
Remington Typewriter Co. v. Simpson.....	848
Ritzhaupt, Collister v.....	794
Robbins v. Flynn.....	318, 321
Rohrer, Curry v.....	469
Rohrer, Freitag v.....	469
Rohrer v. Hastings Brewing Co.....	111
Rohrer, Neylon v.....	469
Rohrer, Rosenberg v.	469
Rohrer, Schissler v.....	469
Rosenberg v. Rohrer.....	469
Russell v. Estate of Close.....	232
St. Vincent's Parish v. Murphy.....	630
Salsbury, Mahoney v.....	488
Sanzleri, Larsen v.....	384
Sarpy County, Cass County v.	435
Sarpy County, Layton v.	628
Schissler v. Rohrer.....	469
Second Nat. Bank v. Snoqua'mie Trust Co.....	645
Segeear v. Westcott.....	515
Seifert v. Dillon.....	322
Several Parcels of Land (Wiman), State v.....	13
Shannon v. Bartholomew.....	821
Sheibley v. Nelson.....	501
Shelley v. Tuckerman.....	366
Shepherdson v. Clopine.....	764
Shults v. Chicago, B. & Q. R. Co.....	272
Simpson, Remington Typewriter Co. v.....	848
Singer Sewing Machine Co. v. Omaha Umbrella Mfg. Co.....	619
Sloan v. Hallowell.....	762
Smith, Cadwell v.....	567
Smith v. Carnahan	667
Smith v. Chicago, B. & Q. R. Co.....	387
Smith v. Union P. R. Co.....	198
Smullin v. Wharton.....	328, 346
Snoqualmie Trust Co., Second Nat. Bank v.....	645
Soucek v. Karr.....	649
South Omaha Nat. Bank v. McGillin.....	439
Sovereign Camp, Woodmen of the World, Hruby v.....	800
Tanislis v. Hartford Fire Ins. Co.....	768
anton v. Driffkorn.....	36
ate, Barnes v.....	443
ate v. Brandt.....	656
ate, Callahan v.....	246
ate v. Dudgeon.....	371
ate, Emerson v.	663
ate, Foster v.	264

	PAGE
State, Fouse v.	258
State, Greene v.	84
State, Howell v.	448
State, Kennison v.	391
State, Lillie v.	268
State, Luther v.	455
State, McCauley v.	431
State, Mott v.	226
State, Poston v.	240
State, Pulver v.	446
State v. Several Parcels of Land (Wilman).....	13
State, ex rel. Dobney, v. Chicago & N. W. R. Co.....	518
State, ex rel. Krebs, v. Hoctor	690
State, ex rel. Luben, v. Chicago & N. W. R. Co.....	524
State, ex rel. Sheffer, v. Fuller.....	784
Steinkraus, Nichols & Shepard Co. v.....	1
Stephenson, Toliver v.....	747
Stewart v. Omaha & C. B. Street R. Co.....	97
Stires v. First Nat. Bank.....	193
Supreme Castle of the Highland Nobles, Higgins v.....	504
Swanson, Jarmin v.....	751
Talmage v. Minton-Woodward Co.....	29
Taylor v. Austin	581
Tebbetts, Gates v.....	573
Teske v. Dittberner.....	701
Thayer County, Johannes v.....	689
Tinglehoff, Acken v.....	296
Tolliver v. Stephenson.....	747
Tuckerman, Shelley v.....	366
Uland, Kendall v.....	527
Union P. R. Co., Quinby v.	777
Union P. R. Co., Smith v.	198
Union P. R. Co., Wally v.	658
Van Buren v. Village of Elmwood.....	596
Vandewege v. Peter.....	140
Van Patten, Gauvreau v.....	64
Varley, Woods v.....	19
Ververka v. Fullmers.....	6
Village of Elmwood, Van Buren v.	596
Village of Syracuse, Reed v.	713
Wally v. Union P. R. Co.....	658
Watson v. Hayward.....	211
Watson, In re.....	211
Webster, Nelson v.....	169
Welch, Chicago, R. I. & P. R. Co. v.....	106

TABLE OF CASES REPORTED.

xv

	PAGE
Welch, Chicago, R. I. & P. R. Co. v.....	110
Welch, Estate of Keegan v.....	166
Westcott, Segear v.....	515
Wharton, Smullin v.....	328, 346
Whedon v. Brown	130
Whitcomb v. Chase	360
Willard v. Key.....	850
Williams v. Phillips.....	105
Wilson, Hibner v.....	252
Wilson, In re Estate of.....	252
Wilson v. Wilson.....	562
Wood, Radford v.....	773
Woods v. Krivohlavek.....	22
Woods v. Lincoln Traction Co.....	23
Woods v. Varley.....	19
Worrall Grain Co. v. Johnson.....	349
Yelser v. Broadwell.....	302

CASES CITED BY THE COURT.

CASES MARKED * ARE OVERRULED IN THIS VOLUME.
CASES MARKED † ARE DISTINGUISHED IN THIS VOLUME.

	PAGE
Aber v. Twitchell, 116 N. W. (N. Dak.) 95.....	517
Adams v. Waggoner, 33 Ind. 531.....	224
Addyston Pipe & Steel Co. v. United States, 175 U. S. 211.....	454
Alberts v. Husenetter, 77 Neb. 699.....	654
Albin v. Parmele, 70 Neb. 740.....	784
Aldrich v. Bank of Ohio, 64 Neb. 276.....	9
Alpin v. Morton, 21 Ohio St. 536.....	502
Altschuler v. Algaza, 16 Neb. 631.....	799
American Fire Ins. Co. v. Landfare, 56 Neb. 482.....	792
American Savings Bank v. Estate of Harrington, 34 Neb. 597.....	238
Andersen v. Borgaard, 83 Neb. 8.....	723
Andresen v. Jetter, 76 Neb. 520.....	601
Argabright v. State, 62 Neb. 402.....	398
Atkins v. Atkins, 18 Neb. 474.....	400
Ault v. Nebraska Telephone Co., 82 Neb. 434.....	739
Aultman, Miller & Co. v. Leahey, 24 Neb. 286.....	270
Austin v. State, 15 Tex. App. 388.....	261
Ayers v. Citizens R. Co., 83 Neb. 26.....	24
Babcock v. Goodrich, 47 Cal. 488.....	526
Babcock v. Probate Court, 18 R. I. 555.....	160
Bacon v. Dawes County, 66 Neb. 191.....	610
Bacon v. Judge of Probate, 100 Mich. 183.....	160
Baggs v. Baggs, 54 Ga. 95.....	161
Bailey v. State, 30 Neb. 855.....	376
Bailey v. Worster, 103 Me. 170.....	345
Baker v. Baker, 51 Wis. 538.....	162
Baker v. Brickell, 87 Cal. 329.....	159
Baker v. Jordan, 3 Ohio St., 438.....	10
Baldwin v. Skeels, 51 Vt. 121.....	530
Ball v. Wicks, 45 Neb. 367.....	32
Baltus v. Farmers Irrigation District, 60 Neb. 310.....	365
Baltimore & O. R. Co. v. Joy, 173 U. S. 226.....	503
Bankers Life Ass'n v. Lisco, 47 Neb. 340.....	426
Banking House of A. Castetter v. Dukes, 70 Neb. 648.....	754
Bartholt v. Wright, 45 Ohio St. 177.....	223
Barber v. State, 54 Neb. 53.....	265

	PAGE
Barney v. Lasbury, 76 Neb. 701.....	169
Barney v. Pinkham, 37 Neb. 664.....	545
Barr v. Post, 56 Neb. 698.....	174, 602
Bartemeyer v. Iowa, 18 Wall. (U. S.) 129.....	114
Bass v. Norfolk R. & L. Co., 100 Va. 1.....	103
Batten v. Klamn, 82 Neb. 379.....	470
Becker v. Simonds, 33 Neb. 680.....	351
Bedell v. Herring, 77 Cal. 572.....	534
Beer v. Dalton, 3 Neb. (Unof.) 694.....	386
Beggs v. Thompson, 2 Ohio, 95.....	9
Belcher v. Case Threshing Machine Co., 78 Neb. 798.....	358
Bell v. Campbell, 123 Mo. 1.....	542
Bell v. Hansley, 48 N. Car. 131.....	224
Bennett v. Bennett, 65 Neb. 432.....	138, 792
Bennett v. Harms, 51 Wis. 251.....	403
Bennett v. Knowles, 66 Minn. 4.....	35
Bennett v. Otto, 68 Neb. 652.....	121
Berry v. Campbell, 118 Ill. App. 646.....	629
Best v. Zutavern, 53 Neb. 604.....	793
Beuttell v. Magone, 157 U. S. 154.....	517
Bigelow v. Forrest, 9 Wall. (U. S.) 339.....	674
Bingham v. Broadwell, 73 Neb. 605.....	69
Bischof v. Merchants Nat. Bank, 75 Neb. 838.....	28
Bissel v. Vermillion Farmers Elevator Co., 102 Minn. 229.....	546
Bixby v. Jewell, 72 Neb. 755.....	587
Blagen v. Smith, 34 Or. 394.....	327
Blanchard v. Chapman, 22 Ill. App. 341.....	345
Blodgett v. McMurtry, 39 Neb. 210.....	129
Bohanan v. State, 18 Neb. 57.....	398
Bonacum v. Harrington, 65 Neb. 831.....	631
Bond v. Wycoff, 42 Neb. 214.....	764
Bone v. State, 86 Ga. 108.....	260
Bonns v. Carter, 22 Neb. 495.....	33
Born v. Home Ins. Co., 120 Ia. 299.....	817
Bowen v. Chase, 98 U. S. 254.....	517
Boyesen v. Heidelbrecht, 56 Neb. 570.....	385
Bradner v. Faulkner, 34 N. Y. 347.....	11
Brady v. Chicago, St. P., M. & O. R. Co., 59 Neb. 233.....	735
Brandt v. State, 80 Neb. 843.....	658
Briffit v. State, 58 Wis. 39.....	460
Brockway v. Patterson, 72 Mich. 122.....	550
Brown v. Carolina C. R. Co., 83 N. Car. 128.....	389
Brown v. Hannital & St. J. R. Co., 99 Mo. 310.....	604
Brown v. Lutz, 36 Neb. 527.....	470
Brown v. State, 9 Neb. 189.....	115
Brownell & Co. v. Fuller, 60 Neb. 558.....	652

CASES CITED BY THE COURT.

xix

	PAGE
Bryant v. Peck & Whipple Co., 154 Mass. 460.....	542
Buchanan v. Belsey, 72 N. Y. Supp. 601.....	321
Buck v. Maddock, 167 Ill. 219.....	550
Buck & Greenwood v. Reed, 27 Neb. 67.....	351
Buckler v. Brown, 101 Ky. 46.....	588
Buffington v. Grosvenor, 46 Kan. 730.....	403
Burk v. State, 79 Neb. 241.....	230
Burt v. State, 23 Ohio St. 394.....	123
Bush v. Griffin, 76 Neb. 214.....	387
Butler v. Kennard, 23 Neb. 357.....	697
Butler v. Libe, 81 Neb. 740.....	671, 677
Buzby v. Philadelphia Traction Co., 126 Pa. St. 559.....	101
Cameron v. Cameron, 15 Wis. 1.....	159
Campbell v. Smith, 71 N. Y. 26.....	493
Carleton v. State, 43 Neb. 373.....	397
Cash v. Lust, 142 Mo. 630.....	321
Cass County v. Sarpy County, 63 Neb. 813, 66 Neb. 476, 72 Neb. 93, 554	
Cassilly v. Rhodes, 12 Ohio, 88.....	9
Cervena v. Thurston, 59 Neb. 343.....	386
Chadron L. & B. Ass'n v. O'Linn, 2 Neb. (Unof.) 246.....	32
Chamberlain v. Brown, 25 Neb. 434.....	352
Chamberlain Banking House v. Woolsey, 60 Neb. 516.....	777
Chase v. Cheney, 58 Ill. 509.....	635
Chesley v. Rocheford & Gould, 4 Neb. (Unof.) 768.....	272
Chicago, B. & Q. R. Co. v. Hogan, 27 Neb. 801	185
Chicago, B. & Q. R. Co. v. Hogan, 30 Neb. 686.....	189
*Chicago, B. & Q. R. Co. v. Kellogg, 55 Neb. 748	71, 77
Chicago, B. & Q. R. Co. v. Schalkopf, 54 Neb. 448	76
Chicago, B. & Q. R. Co. v. Sevcek, 72 Neb. 793	185
Chicago, B. & Q. R. Co. v. Williams, 61 Neb. 608.....	781
†Chicago, B. & Q. R. Co. v. Wymore, 40 Neb. 645.....	277
Chicago City R. Co. v. Robinson, Adm'r, 127 Ill. 9.....	103
Chicago & J. E. R. Co. v. Wanic, 230 Ill. 530.....	103
Chicago, R. I. & P. R. Co. v. Kerr, 74 Neb. 1	792
Chicago, R. I. & P. R. Co. v. Zernecke, 59 Neb. 689.....	117
*Chicago, St. P., M. & O. R. Co. v. Lagerkrans, 65 Neb. 566....	71, 77
Chicago, St. P., M. & O. R. Co. v. Schuldt, 66 Neb. 43.....	781
Chmellir v. Sawyer, 42 Neb. 362.....	301
Christensen v. City of Fremont, 45 Neb. 160.....	608
Chrystie v. Foster, 61 Fed. 551.....	517
Cincinnati Street R. Co. v. Snell, 54 Ohio St. 197.....	103
Citizens State Bank v. Iddings, 60 Neb. 709.....	834
City of Atlanta v. Gabbett, 93 Ga. 266.....	789
City of Friend v. Ingersoll, 39 Neb. 717.....	285
City of North Platte v. North Platte Water Works Co., 56 Neb. 403, 608	

	PAGE
City of Plattsmouth v. Murphy, 74 Neb. 749.....	82
Clark v. Dyer, 81 Tex. 339.....	389
Clark v. Nebraska Nat. Bank, 49 Neb. 800.....	788
Clark v. Superior Court, 55 Cal. 199.....	829
Clarke v. Koenig, 36 Neb. 572.....	45
Cleland v. Anderson, 66 Neb. 252.....	502
Cleland v. Porter, 74 Ill. 76.....	365
Cleveland Paper Co. v. Banks, 15 Neb. 20.....	242
Cline v. Dexter, 72 Neb. 619	238
Clingan v. Dixon County, 74 Neb. 807.....	76
Cluff v. Mutual Benefit Life Ins. Co., 99 Mass. 318.....	426
Colby v. Foxworthy, 78 Neb. 288.....	90
Cole v. Duluth, S. S. & A. R. Co., 104 Wis. 460.....	187
Coleman v. People, 78 Ill. App. 210.....	513
Coleman v. Spearman, Snodgrass & Co., 68 Neb. 28.....	362
Colglazier v. McClary & Martin, 5 Neb. (Unof.) 332.....	121
Collins v. Conners, 81 Mass. 49.....	799
Collisten v. Fassitt, 163 N. Y. 281.....	345
Commonwealth v. Allen, 135 Pa. St. 483.....	231
Commonwealth v. Anthes, 12 Gray (Mass.), 29.....	460
Commonwealth v. Dean, 14 Gray (Mass.), 99.....	460
Commonwealth v. Reybug, 122 Pa. St. 299.....	460
Commonwealth v. Timothy, 8 Gray (Mass.), 480.....	460
Commonwealth v. Worcester, 20 Mass. 462.....	447
Connelly v. Edgerton, 22 Neb. 82.....	123
Connor v. Omaha Nat. Bank, 42 Neb. 602.....	35
Conway v. Wharton, 13 Minn. 145.....	129
Cook v. Chicago, R. I. & P. R. Co., 78 Neb. 64.....	77
Cook v. People, 51 Ill. 143.....	799
Cooper v. American Central Ins. Co., 3 Colo. 318.....	754
Cottrell v. State, 9 Neb. 125.....	798
County of Logan v. McKinley-Lanning L. & T. Co., 70 Neb. 406... ..	668
Courtney v. Knox, 31 Neb. 652.....	640
Cox v. Abbeville Furniture Factory, 75 S. Car. 48.....	484
Craig v. Wead, 58 Neb. 782.....	698
Cranford v. Tyrrell, 128 N. Y. 341.....	327
Cropsey v. Wigenhorn, 2 Neb. 108.....	56
Crowley v. Christensen, 137 U. S. 86.....	114
Crowley v. Genesee Mining Co., 55 Cal. 273.....	648
Cunningham v. Austin, N. W. R. Co., 88 Tex. 534.....	122
Curran v. Wilcox, 10 Neb. 449.....	75
Curtis v. Schell, 129 Cal. 208.....	161
Cutcomp v. Utt, 60 Ia. 156.....	7
Damery v. Ferguson, 48 Ill. App. 224.....	11
Davidson v. New Orleans, 96 U. S. 97.....	12

CASES CITED BY THE COURT.

xxi

	PAGE
Davis v. Neligh, 7 Neb. 84.....	238
Davis v. Ravenna Creamery Co., 48 Neb. 471.....	207
Davis v. State, 31 Neb. 240.....	270, 397
De Berry v. Nicholson, 102 N. Car. 465.....	365
De Camp v. Archibald, 50 Ohio St. 618.....	641
Deck v. Smith, 12 Neb. 393.....	803
Deford v. Mercer, 24 Ia. 118.....	589
Degering v. Flick, 14 Neb. 448.....	352
Dempsie v. Darling, 39 Wash. 125.....	327
Denver & R. G. R. Co. v. Clack, 29 Land Dec. 478.....	684
Devin v. Hilmer, 29 Ia. 297.....	493
Dickson v. Chicago, R. I. & P. R. Co., 71 Mo. 575.....	389
Dinsmore & Co. v. Stimbert, 12 Neb. 433.....	533
Dixon County v. Gantt, 30 Neb. 885.....	764
Doane v. Chicago City R. Co., 160 Ill. 22.....	122
Dobbins v. Oberman, 17 Neb. 163.....	532
Dodge County v. Saunders County, 77 Neb. 787.....	550, 554, 808
Doering v. Kohout, 2 Neb. (Unof.) 436.....	139
Dogge v. State, 21 Neb. 272.....	639
Doolittle v. Shelton, 1 Greene (Ia.), 271.....	754
Dorrington v. Minnick, 15 Neb. 397.....	351
Dougherty v. Pacific Mutual Life Ins. Co., 154 Pa. St. 385.....	426
Douglas v. Hutchinson, 183 Ill. 323.....	133
Driscoll v. Market Street C. R. Co., 97 Cal. 553.....	103
Dunbar v. Briggs, 18 Neb. 94.....	652
Dunlap v. Shingle Springs & P. R. Co., 23 Land Dec. 67.....	684
Dunphy v. Bartenbach, 40 Neb. 143.....	174
Durland v. Seller, 27 Neb. 33.....	159
Dye v. Mann, 10 Mich. 291.....	704
Dye v. Raser, 79 Neb. 149.....	121
Eddie v. Slimmon, 26 N. Y. 9.....	542
Eager v. Crawford, 76 N. Y. 97.....	235
East Jersey Water Co. v. Bigelow, 60 N. J. Law, 201.....	775
Evans v. State, 113 Ga. 749.....	460
Eiseley v. Spooner, 23 Neb. 470.....	725
Eldred v. Eldred, 62 Neb. 613.....	580
Emery v. Fowler, 39 Me. 326.....	143
Enterprise Brewing Co. v. Grime, 173 Mass. 252.....	118
Enps v. State, 19 Ga. 102.....	396
State of Beldeman, Myr. Prob. Rep. (Cal.) 66.....	257
State of Fitzgerald v. Union Savings Bank, 65 Neb. 97.....	129
State of Flickwir, 136 Pa. St. 374.....	335
State of James v. O'Neill, 70 Neb. 132.....	157, 162
State of Rapp v. Elgutter, 77 Neb. 674.....	256
State of Fitchburg R. Co., 111 Mass. 142.....	780

	PAGE
Everton v. Esgate, 24 Neb. 235.....	617
Ex parte Abbott, 7 Okla. 78.....	644
Ex parte Bennett, 44 Cal. 84.....	831
Ex parte Jennings, 60 Ohio St. 319.....	644
Ex parte Krieger, 7 Mo. App. 367.....	644
Ex parte McKee, 18 Mo. 599.....	642
Ex parte Mallinkrodt, 20 Mo. 493.....	644
Ex parte Schoepf, 74 Ohio St. 1.....	644
Fairbury Brick Co. v. Chicago, R. I. & P. R. Co., 79 Neb. 854.....	391
Farmers & Merchants Nat. Bank v. Mosher, 63 Neb. 130.....	306
Farnham v. Colman, 19 S. Dak. 342.....	642
Farwell v. City of Chicago, 71 Ill. 269.....	434
Farwell v. Cohen, 138 Ill. 216.....	35
Farwell v. Crandall, 120 Ill. 70.....	35
Fidelity Mutual Fire Ins. Co. v. Lowe, 4 Neb. (Unof.) 159.....	509
Field v. Stag, 52 Mo. 534.....	493
Fields v. Osborne, 60 Conn. 544.....	67
Fireman's Ins. Co. v. Kuessner, 164 Ill. 280.....	820
First Nat. Bank v. Pennington, 57 Neb. 404.....	532
First Nat. Bank v. Sutton Mercantile Co., 77 Neb. 596.....	831
Fisher v. Von Behren, 70 Ind. 19.....	534
Fitzgerald v. State, 78 Neb. 1.....	230
Fogg v. Hill, 21 Me. 529.....	529
Foley v. Holtry, 43 Neb. 133.....	852
Foley v. State, 42 Neb. 233.....	838
Ford v. Ford, 88 Wis. 122.....	162, 257
Ford v. State, 79 Neb. 309.....	117
Foss v. Marr, 40 Neb. 559.....	9
Foster v. Frost, 25 Neb. 731.....	474
Fox v. Wunderlich, 64 Ia. 187.....	550
Fraaman v. Fraaman, 64 Neb. 472.....	793
France v. Hohnbaum, 73 Neb. 70.....	710
Freeman v. Washtenaw Probate Judge, 79 Mich. 390.....	160
Fremont v. Crippen, 10 Cal. 211.....	526
Fremont, E. & M. V. R. Co. v. Crum, 30 Neb. 70.....	654
Fried v. Royal Ins. Co., 50 N. Y. 243.....	819
Fritz v. Grosnicklaus, 20 Neb. 413.....	764
Fry v. Booth, 19 Ohio St. 25.....	365
Funk v. Carroll County, 96 Ia. 158.....	829
Gage County v. King Bridge Co., 58 Neb. 827.....	352
Gaines v. Saunders, 87 Mo. 557.....	386
Galbraith v. Fleming, 60 Mich. 403.....	222
Gandy v. Jolly, 34 Neb. 536.....	731
Garland v. Smith, 164 Mo. 1.....	345

CASES CITED BY THE COURT.

xxiii

	PAGE
Garner v. State, 28 Kan. 790.....	831
Gates v. Avery, 112 Wis. 271.....	129
George v. Peckham, 73 Neb. 794.....	28
German Ins. Co. v. Frederick, 57 Neb. 540.....	509
Gerrish v. Clough, 48 N. H. 9.....	775
Gibson v. Sexson, 82 Neb. 475.....	747
Giles v. Miller, 36 Neb. 346.....	711
Gillespie v. Morsman, 2 Neb. (Unof.) 162.....	843
Glaser v. Rothschild, 106 Mo. App. 418.....	277
Glidden v. Harrington, 189 U. S. 255.....	16
Globe Publishing Co. v. State Bank, 41 Neb. 175.....	32
Godman v. Converse, 43 Neb. 463.....	159
Gordon & Ferguson v. Doran, 100 Minn. 343.....	486
Gorey v. Kelly, 64 Neb. 605.....	301
Graham v. Flynn, 21 Neb. 229.....	584
Gran v. Houston, 45 Neb. 813.....	513
Grand Island & W. C. R. Co. v. Dawes County, 62 Neb. 44.....	610
Grand Lodge, A. O. U. W., v. Bartes, 64 Neb. 800.....	816
Greenway v. Orthwein Grain Co., 85 Fed. 536.....	758
Greenwood v. King, 82 Neb. 17.....	286
Gregory v. Kaar, 36 Neb. 533.....	400
Griffith v. Bonawitz, 73 Neb. 622.....	69
Grochowaki v. Grochowski, 77 Neb. 506.....	147
Grondin v. Duluth, S. S. & A. R. Co., 100 Mich. 598.....	187
Groscop v. Rainier, 11 Ind. 361.....	118
Grotton v. Glidden, 84 Me. 589.....	223
Gulliton v. Traver, 64 Neb. 51.....	270
Gurnee v. Brunswick, 11 Fed. Cas. 117.....	437
Hagar v. Reclamation District, 111 U. S. 701.....	18, 786
Hahn v. Miller, 60 Ia. 96.....	767
Hale v. Cravener, 128 Ill. 408.....	571
Hale v. Sheehan, 52 Neb. 184.....	207
Hall v. Ogden City Street R. Co., 13 Utah, 243.....	101
Hallum v. Dickinson, 47 Ark. 120.....	79
Hamilton v. Goff, 45 Neb. 339.....	242
Hannabalsen v. Sessions, 116 Ia. 457.....	617
Hardesty v. Hine, 135 Ind. 72.....	118, 122
Hardmann v. Bowen, 39 N. Y. 196.....	35
Hargreaves v. Korcek, 44 Neb. 660.....	542
Harness v. State, 57 Ind. 1.....	123
Harral v. Gray, 10 Neb. 186.....	489
Harrison v. Des Moines & Ft. D. R. Co., 91 Ia. 114.....	623
Harrison v. Harrison, 80 Neb. 103.....	318
Hershman v. Slonaker, 53 Ia. 467.....	162
Hest v. State, 14 Neb. 572.....	399

	PAGE
Hatch v. Shold, 62 Neb. 764.....	670
Hatfield v. Commonwealth, 120 Pa. St. 395.....	460
Hauptman v. Pike, 77 Neb. 105.....	172
Havemeyer v. Dahn, 48 Neb. 536.....	794
Hayes v. Boylan, 141 Ill. 400.....	236
Heald v. Polk County, 46 Neb. 28.....	438
Heelan v. Hoagland, 10 Neb. 511.....	33
Heidemann v. Noxon, 83 Neb. 175.....	652
Henry v. Henry, 73 Neb. 746.....	256
Herman v. Beck, 68 Neb. 566.....	128
Hester v. Bourland, 80 Ark. 145.....	133
Holland v. Chicago, B. & Q. R. Co., 52 Neb. 100.....	754
Holland v. Vinson, 124 Mo. App. 417.....	699
Hollembaek v. Drake, 37 Neb. 680.....	123, 474
Holmes v. Mason, 80 Neb. 448.....	587
Holmes v. State, 88 Ala. 26.....	396
Home Fire Ins. Co. v. Fallon, 45 Neb. 554.....	509
Hoover & Son v. Haynes, 65 Neb. 557.....	603
Hopkins v. State, 64 Neb. 10.....	526
Hopkins v. United States, 171 U. S. 578.....	454
Horbach v. Tyrrell, 48 Neb. 514.....	32, 794
Horn v. Smith, 77 Ill. 381.....	513
Howard v. McCabe, 79 Neb. 42.....	298
Hubbart v. Walker, 19 Neb. 94.....	494
Huckins v. Kapf, 14 S. W. (Tex. App.) 1016.....	126
Hudson v. Bunch, 116 Ind. 63.....	786
Hull v. Kansas City & O. R. Co., 70 Neb. 756.....	108
Hunt v. Blackburn, 131 U. S. 403.....	92
Hurlburt v. State, 52 Neb. 428.....	665
Hyland v. Milner, 99 Ind. 308.....	123
Ingersoll v. Rosseau, 35 Wash. 92.....	326
In re Abeles, 12 Kan. 451.....	641
In re Adamek, 82 Neb. 448.....	106
In re Butler, 76 Neb. 267.....	641
In re Clapham's Estate, 73 Neb. 492.....	340
In re Contest Proceedings, 31 Neb. 262.....	133
In re Cubberly, 39 Kan. 291.....	644
In re Davis, 38 Kan. 408.....	644
In re Dougherty's Estate, 34 Mont. 336.....	160
In re Estate of Neckel, 80 Neb. 123.....	127
In re Estate of Stevens, 83 Cal. 322.....	162
In re Estate of Wolfe, 4 Ohio N. P. 336.....	257
In re Haymond, 121 Cal. 385.....	216
In re Huron, 58 Kan. 152.....	642
In re Kerrigan, 33 N. J. Law, 344.....	642

CASES CITED BY THE COURT.

XXV

	PAGE
In re King's Estate, 113 Mich. 606.....	257
In re Simon's Will, 55 Conn. 239.....	345
In re Walker, 61 Neb. 803.....	798
In re Woodward's Estate, 78 Vt. 254.....	337
Interstate Savings & Loan Ass'n v. Strine, 58 Neb. 133.....	794
Irving v. Campbell, 121 N. Y. 353.....	565
Iske v. State, 72 Neb. 278.....	554
Ivey v. Coleman, 42 Ala. 409.....	257
Jackson v. State, 39 Ohio St. 37.....	269
Jackson v. Walker, 7 Cow. (N. Y.) *637.....	386
Jackson v. Wilson, 117 Ala. 432.....	159
Jamestown & N. R. Co. v. Jones, 177 U. S. 125.....	684
Jessen v. Wilhite, 74 Neb. 608.....	299
Jetter v. Lyon, 70 Neb. 429.....	108
Jewett v. Black, 60 Neb. 173.....	570
Jockers v. Borgman, 29 Kan. 109.....	550
Johnson v. Adams & Co., 92 Ga. 551.....	35
Johnson v. Dosland, 103 Minn. 147.....	132
Johnson v. Gulick, 46 Neb. 817.....	852
Johnson v. Johnson, 51 Ohio St. 446.....	345
Johnson & Millen v. Buck, 35 N. J. Law, 338.....	202
Jones v. Bates, 26 Neb. 693.....	298
Jones v. Crosthwaite, 17 Ia. 393.....	576
Jones v. Gale, 22 Mo. App. 637.....	224
Jones v. Wiesen, 50 Neb. 243.....	649
Joyce v. City of East St. Louis, 77 Ill. 156.....	434
Kansas City & O. R. Co. v. Rogers, 48 Neb. 653.....	654
Kelly v. Broadwell, 3 Neb. (Unof.) 617.....	610
Kent v. State, 64 Ark. 247.....	393
Kerkow v. Bauer, 15 Neb. 150.....	460
Kettenbach v. Omaha Life Ass'n, 49 Neb. 842.....	509
Kettering v. City of Jacksonville, 50 Ill. 39.....	460
Kilbourn v. Thompson, 103 U. S. 168.....	642
Kilpatrick-Koch Dry Goods Co. v. Bremers, 44 Neb. 863.....	33
Kimbro v. Clark, 17 Neb. 403.....	496
Kimbro v. New York Life Ins. Co., 134 Ia. 84.....	818
King v. Portland City, 184 U. S. 61.....	18
Kipp v. Dawson, 59 Minn. 82.....	428
Kirk v. Taylor's Heirs, 8 B. Mon. (Ky.) 262.....	386
Klawitter v. State, 76 Neb. 49.....	230
Kloke v. Wolff, 78 Neb. 504.....	794
Knight v. Denman, 64 Neb. 814.....	387
Knights of the Maccabees of the World v. Nitsch, 69 Neb. 372.....	427
Kofka v. Rosicky, 41 Neb. 328.....	45, 416

	PAGE
Kountze v. Scott, 49 Neb. 258.....	496
Krebs v. State, 8 Tex. App. 1.....	394
Kremling v. Lallman, 16 Neb. 280.....	798
Kroh v. Heins, 48 Neb. 691.....	126, 563
Krueger v. Jenkins, 59 Neb. 641.....	584
Krum v. Chamberlain, 57 Neb. 220.....	36
Krumenaker v. Dougherty, 77 N. Y. Supp. 467.....	485
Laing v. Rigney, 160 U. S. 531.....	517
Lambert v. Stevens, 29 Neb. 283.....	470
Langan v. Village of Wood River, 77 Neb. 444.....	692
Langdon v. Clarke, 73 Neb. 516.....	618
Lange v. Royal Highlanders, 75 Neb. 196.....	51
Larson v. Calder, 16 N. Dak. 248.....	517
Lawton v. Fonner, 59 Neb. 214.....	207
Leavitt v. Bell, 55 Neb. 57.....	15
Lederer v. Union Savings Bank, 52 Neb. 133.....	351
Lee v. Gregory & Perry, 12 Neb. 282.....	834
Ligare v. Semple, 32 Mich. 438.....	403
Lightfoot v. Commonwealth, 80 Ky. 516.....	393
Lillie v. State, 83 Neb. 268.....	260
Lincoln Land Co. v. Village of Grant, 57 Neb. 70.....	608
Lincoln Traction Co. v. Brookover, 77 Neb. 221.....	101
Lindley v. Hofman, 22 Ind. App. 237.....	534
Linton v. Cathers, 4 Neb. (Unof.) 641.....	303
Lisbon v. Lyman, 49 N. H. 553.....	91
Livingston v. Corey, 33 Neb. 366.....	106
Loewe v. Lawlor, 208 U. S. 274.....	455
Lomerson v. Johnston, 47 N. J. Eq. 312.....	541
Lowell v. Shannon, 60 Ia. 713.....	588
Lutheran Evangelical Church v. Gristgau, 34 Wis. 328.....	635
Lydick v. State, 61 Neb. 309.....	584
McClelland v. Scroggin, 35 Neb. 536.....	621
McClure v. City of Broken Bow, 81 Neb. 384.....	629
McCook v. McAdams, 76 Neb. 1.....	78
McCormack v. Henderson, 100 Mo. App. 647.....	700
McCreery v. Schaffer, 26 Neb. 173.....	566, 834
McDowell v. First Nat. Bank, 73 Neb. 307.....	159
McKelvain v. Allen, 58 Tex. 383.....	386
Mackey v. Peterson, 29 Minn. 298.....	534
Mackie, Beattie & Co. v. Glendenning, 49 Ga. 367.....	161
McKillip v. Harvey, 80 Neb. 264.....	56
McMillen v. Anderson, 95 U. S. 37.....	18
McNatt v. McRae, 117 Ga. 898.....	224
McNeil v. Mullin, 70 Kan. 634.....	224

CASES CITED BY THE COURT.

xxvii

	PAGE
Mangold v. Oft, 63 Neb. 397.....	618
Mansfield v. Gregory, 11 Neb. 297.....	493
Marden v. Portsmouth, K. & Y. Street R. Co., 100 Me. 41.....	101
Marsan v. French, 61 Tex. 173.....	327
Marshall v. Piggott, 78 Neb. 722.....	256
Martin v. Elden, 32 Ohio St. 282.....	123
Martin v. Johnston, 34 Neb. 797.....	649
Martin v. State, 23 Neb. 371.....	115
Martin v. State, 30 Neb. 507.....	106
Mason v. Columbia Finance & Trust Co., 99 Ky. 117.....	588
Masters v. Marsh, 19 Neb. 458.....	123
Mathews v. State, 19 Neb. 330.....	230
Maul v. Drexel, 55 Neb. 446.....	94
Mead v. Tzschuck, 57 Neb. 615.....	800
Meaher v. Cox, Brainard & Co., 37 Ala. 201.....	208
Medland v. Connell, 57 Neb. 11.....	15
Merchants Nat. Bank v. Citizens Gas Light Co., 159 Mass. 505.....	648
Merritt v. Parker, 1 N. J. Law, 460.....	775
Mette v. McGuckin, 18 Neb. 323.....	114
Meyer, Bannerman & Co. v. Keefer, 58 Neb. 220.....	496
Miles v. State, 53 Neb. 305.....	692
Millard v. Wegner, 68 Neb. 574.....	110
Miller v. Larned, 103 Ill. 562.....	759
Miller v. State, 78 Neb. 645.....	269
Miller v. Waite, 60 Neb. 431.....	33
Minneapolis, St. P. & S. S. M. R. Co. v. Doughty, 208 U. S. 251.....	684
Missouri, K. & T. R. Co. v. Clark, 60 Neb. 406.....	90
Missouri P. R. Co. v. Fox, 60 Neb. 531.....	652
Missouri P. R. Co. v. Tipton, 61 Neb. 49.....	654
Mobile Marine D. & M. Ins. Co. v. McMillan & Son, 31 Ala. 711... ..	235
Monday v. O'Neill, 44 Neb. 724.....	9
Montague & Co. v. Lowry, 193 U. S. 38.....	455
Moore v. Scott, 47 Neb. 346.....	852
Morgan v. Bergen, 3 Neb. 209.....	45, 570
Morgan v. Hardy, 16 Neb. 427.....	36, 210
Morgan v. Morgan, 36 Miss. 348.....	160
Morse v. Chicago, B. & Q. R. Co., 81 Neb. 745.....	389
Moulton v. Masonic Mutual Benefit Society, 64 Kan. 56.....	819
Mulhollan v. Scoggin, 8 Neb. 202.....	764
Murphy v. Willow Springs Brewing Co., 81 Neb. 223.....	513
Myers v. Bealer, 30 Neb. 280.....	532
Myers v. Moore, 78 Neb. 448.....	516
National Fire Ins. Co. v. Eastern Building & Loan Ass'n, 63 Neb. 698	138
National Life Ins. Co. v. Dawes County, 67 Neb. 40.....	609

	PAGE
Naudain v. Fullenwider, 72 Neb. 221.....	494
Nebraska L. & T. Co. v. Hamer, 40 Neb. 281.....	671
Nebraska Moline Plow Co. v. Fuehring, 60 Neb. 316.....	305
Nebraska Mutual Hall Ins. Co. v. Meyers, 66 Neb. 657.....	816
Nebraska Telephone Co. v. Cornell, 59 Neb. 737.....	786
Nelson v. Chicago, B. & Q. R. Co., 78 Neb. 57.....	780
Niccolls v. Esterly, 16 Kan. 32.....	238
Nicholas v. Jones, 23 Neb. 813.....	698
North & Co. v. Angelo, 75 Neb. 381.....	516
Northern P. R. Co. v. Townsend, 190 U. S. 267.....	684
Northern Trust Co. v. Albert Lea College, 68 Minn. 112.....	754
Nowotny v. Blair, 32 Neb. 175.....	284
Oberfelder v. Kavanaugh, 21 Neb. 483.....	730
O'Chanden v. State, 46 Neb. 10.....	843
O'Donnell v. Segar, 25 Mich. 367.....	123
Ogden Paint, Oil & Glass Co. v. Child, 10 Utah. 475.....	35
Olmsted v. Edson, 71 Neb. 17.....	640
Omaha Nat. Bank v. Kiper, 60 Neb. 33.....	792
Omaha & R. V. R. Co. v. Walker, 17 Neb. 432.....	242
†Omaha & R. V. R. Co. v. Wright, 47 Neb. 886.....	277
Omaha Street R. Co. v. Beeson, 36 Neb. 361.....	838
Omaha Street R. Co. v. Elkins, 39 Neb. 480.....	143, 651
Omaha Street R. Co. v. Loehneisen, 40 Neb. 37.....	101
Omaha Street R. Co. v. Mathiesen, 73 Neb. 820.....	103
Oregon S. L. R. Co. v. Harkness, 27 Land Dec. 430.....	684
Orient Ins. Co. v. Hayes, 61 Neb. 173.....	586
Overland Cotton Mill Co. v. People, 32 Colo. 263.....	118
Overpeck v. City of Rapid City, 14 S. Dak. 507.....	629
Parker v. Hughes, 64 Kan. 216.....	69
Parkins v. Missouri P. R. Co., 76 Neb. 242.....	138
Pauckner v. Wakem, 231 Ill. 276.....	277
Payne v. Ryan, 79 Neb. 414.....	473
Payson v. People, 175 Ill. 267.....	789
People v. Draper, 15 N. Y. 532.....	786
People v. Griesbach, 211 Ill. 35.....	122
People v. Heidelberg Garden Co., 233 Ill. 290.....	118
People v. Leubischer, 34 N. Y. App. Div. 577.....	643
People v. Millard, 53 Mich. 63.....	126
People's Nat. Bank v. Geisthardt, 55 Neb. 232.....	545
Perteet v. People, 70 Ill. 171.....	393
Peterson v. Estate of Bauer, 76 Neb. 652.....	318, 411
Peterson v. State, 63 Neb. 251.....	460
Peterson v. State, 79 Neb. 132.....	447
Peterson v. Tufts, 34 Neb. 8.....	730

	PAGE
Pettis v. Green River Asphalt Co., 71 Neb. 513.....	127
Pettit v. Great Northern R. Co., 58 Minn. 120.....	281
Phelan v. Moss, 67 Pa. St. 59.....	532
Phelps v. Foot, 1 Conn. 387.....	173
Phelps v. Sullivan, 140 Mass. 36.....	493
Phenix Ins. Co. v. Kerr, 129 Fed. 723.....	517
Phillips v. Hogue, 63 Neb. 192	305
Phillips v. Jones, 12 Neb. 213	852
Platt v. People, 29 Ill. 54.....	365
Pike v. Hauptman, 83 Neb. 172.....	651
Pitman v. Boner, 81 Neb. 736.....	750
Pixley v. Clark, 35 N. Y. 520.....	775
Placke v. Union Depot R. Co., 140 Mo. 634.....	28
Pleuler v. State, 11 Neb. 547.....	115
Pollard v. Turner, 22 Neb. 366.....	352
Poppleton v. Moores, 62 Neb. 851, 67 Neb. 388.....	83
Pottinger v. Garrison, 3 Neb. 221.....	351
Potvin v. Curran & Chase, 13 Neb. 302.....	698
Pounder v. Ashe, 44 Neb. 672.....	631
Powell v. Egan, 42 Neb. 482.....	474
Preferred Accident Ins. Co. v. Stone, 61 Kan. 48.....	818
Pride v. Baker, 64 S. W. (Tenn.) 329.....	542
Provost v. McEncroe, 102 N. Y. 650.....	517
Pursley v. Hays, 17 Ia. 310.....	588
Rabidon v. Chicago & W. M. R. Co., 115 Mich. 390.....	187
Ramey v. Woodward, 90 Miss. 777.....	133
Ramsdell v. Sigerson, 2 Gilm. (Ill.) 78.....	35
Rapp v. Sarpy County, 71 Neb. 382.....	77
Rea v. McDonald, 68 Minn. 187.....	759
Reclamation District v. Hagar, 66 Cal. 54.....	786
Reed v. Douthitt, 62 Ill. 348.....	236
Reed v. Morton, 24 Neb. 760.....	493
Rees v. Storms, 101 Minn. 381.....	129
Reeve v. First Nat. Bank, 54 N. J. Law, 208.....	648
Reischick v. Rieger, 68 Neb. 348.....	290, 418
Reynolds v. Tompkins, 23 W. Va. 229.....	700
Rhea v. State, 63 Neb. 461.....	399
Ribble v. Furnfin, 69 Neb. 38.....	254
Richmond, F. & P. R. Co. v. Smead & Smith, 19 Grat. (Va.) 354..	648
Rieger v. Schaible, 81 Neb. 33.....	157, 162
Riley v. Trenton, 51 N. J. Law, 498.....	378
Roberts v. Briscoe, 44 Ohio St. 596.....	238
Roberts v. Sioux City & P. R. Co., 73 Neb. 8.....	685
Rogers v. Sample, 28 Neb. 141.....	512
Rose v. People, 81 Ill. App. 128.....	799

	PAGE
Rosenberg v. Chicago, B. & Q. R. Co., 77 Neb. 663.....	187
Rosenberg v. Sprecher, 74 Neb. 176.....	529
Rosenstiel v. Gray, 112 Ill. 282.....	208
Rouse v. Melshelmer, 82 Mich. 172.....	298
Ruddell v. Fhalor, 72 Ind. 533.....	534
Runge v. Brown, 23 Neb. 817.....	852
Rupert v. Penner, 35 Neb. 587.....	784
Russell v. Estate of Close, 79 Neb. 318.....	234, 563
Ruzicka v. Hotovy, 72 Neb. 589.....	203
Sager v. Summers, 49 Neb. 459.....	32
St. Paul Trust Co. v. Kittson, 84 Minn. 493.....	254
Saline County v. Gage County, 66 Neb. 844.....	554
Sanders v. State, 34 Neb. 872.....	377
Sanford v. Craig, 52 Neb. 483.....	545
Schinz v. Schinz, 90 Wis. 236.....	257
Schmitt & Bro. Co. v. Mahoney, 60 Neb. 20.....	503
Schott v. Dosh, 49 Neb. 187, 195.....	111
Scott v. West, 63 Wis. 529.....	162
Second Nat. Bank v. Morgan, 165 Pa. St. 199.....	532
Security Trust & Safety Vault Co. v. City of Lexington, 203 U. S. 323	17
Seele v. Phelps, 81 Neb. 690.....	123
Selby v. Pueppka, 73 Neb. 179.....	676
Sellars v. Foster, 27 Neb. 118.....	174
Seymour v. City of Tacoma, 6 Wash. 427.....	365
Shannon v. City of Omaha, 73 Neb. 507.....	787
Shannon v. Frost, 3 B. Mon. (Ky.) 253.....	634
Shaw v. State, 97 Ind. 23.....	786
Shay v. Thompson, 59 Wis. 540.....	224
†Sheedy v. Sheedy, 36 Neb. 373.....	252, 257
Shepperd v. Bankers Union of the World, 77 Neb. 85.....	50
Shold v. Van Treeck, 82 Neb. 99.....	828
Showers' Estate v. Morrill, 41 Mich. 700.....	254
Shumway v. State, 82 Neb. 165.....	391
Shutt v. Lockner, 77 Neb. 397.....	530
Sims v. Jones, 54 Neb. 769.....	726
Sloan v. Thomas Mfg. Co., 58 Neb. 713.....	33
Smith v. Johnson, 43 Neb. 754.....	731
Smith v. Perry, 52 Neb. 738.....	563
Smith v. Simon, 69 Mich. 481.....	222
Smith v. State, 42 Neb. 356.....	651
Smith v. Thompson, 67 Neb. 527.....	646
Solt v. Anderson, 71 Neb. 826.....	794
Sorensen v. Sorensen, 68 Neb. 483.....	792
Sothman v. State, 66 Neb. 302.....	460

	PAGE
South Omaha Nat. Bank v. McGillin, 77 Neb. 6.....	439
South Park Improvement Co. v. Baker, 51 Neb. 392.....	496
South Platte Land Co. v. City of Crete, 11 Neb. 344.....	182
Southern Express Co. v. State, 1 Ga. App. 700.....	118
Southern P. R. Co. v. Pool, 160 U. S. 438.....	745
Sovereign Camp, W. O. W., v. Grandon, 64 Neb. 39.....	92
Spaulding v. State, 61 Neb. 289.....	266
Spiking v. Consolidated R. & P. Co., 33 Utah, 313.....	103
Sporer v. McDermott, 69 Neb. 533.....	367
Staats v. Wilson, 76 Neb. 204.....	589
Stahnka v. Kreitle, 66 Neb. 829.....	298
Stanford v. McGill, 6 N. Dak. 536.....	517
Starkey v. Palm, 80 Neb. 393.....	471
State v. Andrews, 11 Neb. 523.....	113, 469, 473
State v. Bankers Union of the World, 71 Neb. 622.....	51
State v. Bartley, 56 Neb. 810.....	838
State v. Botha, 27 Utah, 289.....	396
State v. Brill, 58 Minn. 152.....	428
State v. Brown, 90 Miss. 876.....	133
State v. Chicago, B. & Q. R. Co., 71 Neb. 593.....	523
State v. Chicago & N. W. R. Co., 83 Neb. 524.....	519
State v. Chicago, St. P., M. & O. R. Co., 19 Neb. 476.....	526
State v. Citizens R. Co., 80 Neb. 357.....	27
State v. Collins, 70 N. Car. 241.....	399
State v. County Commissioners, 60 Neb. 566.....	207
State v. Crinklaw, 40 Neb. 759.....	391
State v. Cummings, 17 Neb. 311.....	115
State v. Dudgeon, 83 Neb. 371.....	693
State v. Dusenberry, 112 Mo. 277.....	270
State v. Gee, 28 Or. 100.....	428
State v. Gill, 89 Minn. 502.....	460
State v. Hanson, 80 Neb. 724.....	785
State v. Hardy, 7 Neb. 377.....	377
State v. Hoffman, 75 Mo. App. 380.....	393
State v. Holcomb, 46 Neb. 88.....	116
State v. Horton, 70 Neb. 334.....	844
State v. Hunt, 141 Mo. 626.....	270
State v. Intoxicating Liquors, 76 Ia. 243.....	460
State v. Jenkins, 64 N. H. 375.....	460
State v. Johnson, 89 Ia. 1.....	799
State v. Kaso, 25 Neb. 607.....	474
State v. Kearney County, 12 Neb. 6.....	552
State v. Kent, 5 N. Dak. 516.....	394
State v. Kingsley, 39 Ia. 439.....	230
State v. Lenihan, 88 Ia. 670.....	230
State v. McBride, 5 Neb. 102.....	529

	PAGE
State v. McGinn, 109 Ia. 641.....	230
State v. Merrell, 43 Neb. 575.....	437
State v. Montgomery, 79 Ia. 737.....	231
State v. Neble, 82 Neb. 267.....	824
State v. Norris, 127 Ia. 683.....	231
State v. O'Connell, 99 Me. 61.....	460
State v. Porter, 58 Ia. 19.....	7
State v. Ramsey, 50 Neb. 166.....	843
State v. Robinson, 42 Minn. 107.....	433
State v. Ross, 82 Neb. 414.....	788
State v. Russell, 34 Neb. 116.....	67
State v. Savage, 64 Neb. 684.....	57
State v. Schwin, 65 Wis. 207.....	428
State v. Sheldon, 78 Neb. 552.....	116
State v. Smith, 66 Mo. 61.....	665
State v. Stearns, 11 Neb. 104.....	526
State v. Stevenson, 18 Neb. 416.....	658
State v. Story, 87 Minn. 5.....	467
State v. Stout, 7 Neb. 89.....	438
State v. Stuht, 52 Neb. 209.....	377
State v. Telssedre, 30 Kan. 476.....	460
State v. Van Camp, 36 Neb. 91.....	133
State v. Vincent, 46 Neb. 408.....	438
State v. Weber, 20 Neb. 467.....	474
State v. Yager, 72 Ia. 421.....	460
State Bank v. Green, 8 Neb. 297.....	670
State Electro-Medical Institute v. State, 74 Neb. 40.....	118
Stedman v. Rochester Loan & Banking Co., 42 Neb. 641.....	649
Steenerson v. Waterbury, 52 Minn. 211.....	129
Steinkraus v. Hurlburt, 20 Neb. 519.....	123
Stewart v. Waterloo Turn Verein, 71 Ia. 226.....	118
Stewart's Estate, 137 Pa. St. 175.....	159
Stichter v. Cox, 52 Neb. 532.....	128
Stinson v. People, 43 Ill. 397.....	665
Stockwell v. Brant, 97 Ind. 474.....	117
Stoppert v. Nierle, 45 Neb. 105.....	796
Stout v. State, 96 Ind. 407.....	460
Strauch v. Uhler, 95 Minn. 304.....	162
Strickler v. Grass, 32 Neb. 811.....	798
Sturmdorf v. Saunders, 102 N. Y. Supp. 1042.....	517
Supreme Tent, K. M. W., v. Stensland, 206 Ill. 124.....	425
Suther v. State, 118 Ala. 88.....	231
Swartz v. Ballou, 47 Ia. 188.....	493
Swift v. Dewey, 20 Neb. 107.....	566
Swift & Co. v. United States, 196 U. S. 375.....	455

CASES CITED BY THE COURT.

xxxiii

	PAGE
Talcott v. Philbrick, 59 Conn. 472.....	67
Taylor v. Ainsworth, 49 Neb. 696.....	238
Teske v. Dittberner, 70 Neb. 544.....	566, 702
Thatcher v. West River Nat. Bank, 19 Mich. 196.....	760
Theurer v. People, 211 Ill. 296.....	122
Thomas v. Dansby, 74 Mich. 398.....	513
Thompson v. Eagan, 70 Neb. 169.....	122
Thompson v. Pope, 77 Neb. 338.....	726
Thornburn v. Doscher, 32 Fed. 810.....	403
Tillotson v. Smith, 32 N. H. 90.....	775
Tindall v. Peterson, 71 Neb. 160.....	587
Todd v. City of Crete, 79 Neb. 671.....	716
Tomlinson v. Nelson, 49 Wis. 679.....	159
Town of Eldora v. Burlingame, 62 Ia. 32.....	377
Towns v. Klamath County, 33 Or. 225.....	18
Travis v. Pierson, 43 Ill. App. 579.....	629
Tripp v. Hasceig, 20 Mich. 254.....	11
Turpin v. Lemon, 187 U. S. 51.....	15
Tyson v. Washington County, 78 Neb. 211.....	690
Uhl v. May, 5 Neb. 157.....	494
Union P. R. Co. v. McDonald, 152 U. S. 262.....	744
Union P. R. Co. v. Murphy, 76 Neb. 545.....	664
Union P. R. Co. v. Smith, 5 Neb. (Unof.) 631.....	198
Union Stock Yards Co. v. Conoyer, 41 Neb. 617.....	77
United States v. Bishop, 125 Fed. 181.....	517
Updegraff v. Palmer, 107 Ind. 181.....	786
Van Campen v. Knight, 63 Barb. (N. Y.) 205.....	571
Vanderlip v. Derby, 19 Neb. 165.....	474
Vandewege v. Peter, 83 Neb. 140.....	651
Van Etta v. Evenson, 28 Wis. 33.....	493
Van Skike v. Potter, 53 Neb. 28.....	174
Van Vleck v. Anderson, 136 Ia. 366.....	231
Vernon v. Upsen, 60 Wis. 418.....	35
Vincent v. Deffeld, 105 Mich. 315.....	529
Waddle v. Ishe, 12 Ala. 308.....	57
Wagner v. State, 43 Neb. 1.....	106
Wakeley v. City of Omaha, 58 Neb. 245.....	15
Walker v. Walker, 42 Ill. 311.....	236
Wallace v. Sheldon, 56 Neb. 55.....	340
Walston v. Nevin, 128 U. S. 578.....	18
Wamsley v. Crook, 3 Neb. 344.....	589
Wardell v. McConnell, 23 Neb. 152.....	301
Wartana v. State, 105 Ind. 445.....	398

	PAGE
Watkins v. Grieser, 11 Okla. 302	118
Watson v. Jones, 13 Wall. (U. S.) 679.....	635
Weakley v. Page, 102 Tenn. 178.....	327
Webster v. City of Hastings, 59 Neb. 563.....	502
Weed v. Boston, 172 Mass. 28.....	18
Weeping Water v. Reed, 21 Neb. 261.....	97
Wehn v. Commissioners of Gage County, 5 Neb. 494.....	82
Wehrs v. State, 132 Ind. 157.....	641
Westbrook Mfg. Co. v. Warren, 77 Me. 437.....	776
Western Nat. Bank v. Rizer, 12 Colo. App. 202.....	159
Western Travelers Accident Ass'n v. Tomson, 72 Neb. 674.....	138, 792
Weyrich v. People, 89 Ill. 90.....	393
Whissen v. Furth, 73 Ark. 366.....	118
White v. Atlas Lumber Co., 49 Neb. 82.....	570
White v. Iltis, 24 Minn. 43.....	754
Whithed v. St. Anthony & Dakota Elevator Co., 9 N. Dak. 224.....	529
Whitlock v. Gosson, 35 Neb. 829.....	566, 794
Wiese v. Gerndorf, 75 Neb. 826.....	301
Wightman v. Devere, 33 Wis. 570.....	513
Wilcox v. Henry, 35 Wash. 591.....	327
Willey v. Carpenter, 64 Vt. 212.....	224
Williams v. Bayley, 35 L. J. Ch. (Eng.) 717.....	541
Williams v. Stoll, 79 Ind. 80.....	534
Willis v. State, 43 Neb. 102.....	270
† Wilson v. Otoe County, 71 Neb. 435.....	497, 499
Winn v. Sanford, 145 Mass. 302.....	576
Wirth v. Calhoun, 64 Neb. 316.....	546
Wise v. Newatney, 26 Neb. 88.....	93
Wisner v. Mabley Estate, 74 Mich. 143.....	256
Wittenberg v. Mollyneaux, 59 Neb. 203.....	173
Wittenberg v. Mollyneaux, 60 Neb. 583.....	123
Wood v. Speck, 78 Neb. 435.....	677, 793
Woodward v. Whitescarver, 6 Ia. 1.....	754
Wright v. Hake, 38 Mich. 525.....	577
Wright v. Wright, 95 Mass. 207.....	160
Yale v. Wheelock, 109 Mass. 502.....	577
Yelser v. Cathers, 5 Neb. (Unof.) 204.....	304
Young v. Beveridge, 81 Neb. 180.....	550
Youngson v. Bond, 69 Neb. 356.....	290
Zweibel v. Caldwell, 72 Neb. 47.....	754

STATUTES AND CONSTITUTIONAL PROVISIONS CITED AND CONSTRUED.

NEBRASKA.

CONSTITUTION.

PAGE

Art. I, sec. 3	553
Art. I, sec. 24	754
Art. III, sec. 15	84, 553
Art. VI, sec. 1	639
Art. VI, sec. 16	287
Art. VI, sec. 18	372, 636, 643
Art. VI, sec. 19	657
Art. VI, sec. 23	644
Art. IX, sec. 3	667
Art. XVI, sec. 1	553
Art. XVI, sec. 4	640

SESSION LAWS.

1855.

P. 158	115
--------------	-----

1858.

Pp. 256-260	115
-------------------	-----

1866.

Ch. 47, sec. 3	581
----------------------	-----

1871.

P. 125	596
--------------	-----

1875.

P. 24	115
-------------	-----

Pp. 301-308	553
-------------------	-----

1879.

P. 193	596
--------------	-----

P. 193, sec. 69, subd. XXVII	598
------------------------------------	-----

P. 193, sec. 117	598
------------------------	-----

1897.

Ch. 47, sec. 1	48
----------------------	----

1901.

Ch. 93, sec. 3	84
----------------------	----

1903.

Ch. 52	820
--------------	-----

Ch. 52, sec. 15	811
-----------------------	-----

	1905.	PAGE
Ch. 97		443
	1907.	
Ch. 52		131
Ch. 82		112
Ch. 90		524
Ch. 153		784

REVISED STATUTES.

	1866.	
Ch. 29		115
Ch. 47, sec. 19.....		583

GENERAL STATUTES.

	1873.	
Ch. 58, secs. 572, 574-579, 581.....		115
Ch. 58, secs. 572-590		115
Ch. 81, secs. 7, 27, 29		598

ANNOTATED STATUTES.

	1903.	
Secs. 6085-6088		553
	1907.	
Sec. 3507		30
Secs. 3507, 3538		33
Sec. 3516		34
Sec. 4128		30
Secs. 4441, 4455, 6147		437
Sec. 4469		497
Sec. 4825		843
Sec. 5045		166
Sec. 5338		580
Sec. 5500		788
Secs. 5500, 5514		689
Sec. 5598		784
Sec. 5601		788
Secs. 5862, 5877, 5884, 5887, 5898.....		131
Secs. 6146, 6147		436
Secs. 6146-6148		806
Sec. 6197		629
Sec. 6656		426
Secs. 7150, 7152, 7153, 7156		115
Secs. 7150, 7159-7161, 7165-7168		115
Sec. 7157		106
Secs. 7161, 7170, 7171		375
Sec. 7168		281
Sec. 7170		240
Secs. 7175, 8518, 8519, 8533.....		113

STATUTES, ETC., CITED.

xxxvii

	PAGE
Sec. 7179	19
Sec. 7194	116
Sec. 7677	432
Sec. 7943	372
Secs. 8308, 8414	692
Sec. 8536	114
Sec. 8962	609
Secs. 8969, 8970	608
Secs. 9015-9018	597
Sec. 10649	519
Secs. 10649, 10650, 10658.....	525
Sec. 10807	565
Sec. 10816	109
Sec. 10856	169
Sec. 11061	16

COMPILED STATUTES.

	1881.	
Ch. 50		115
	1889.	
Ch. 50		513
	1893.	
Ch. 12a, sec. 85		14
	1903.	
Ch. 14, art. I, sec. 69, subd. 15.....		713
Ch. 23, sec. 20		403
Ch. 23, sec. 165		724
Ch. 23, sec. 202		726
	1905.	
Ch. 12a, sec. 57		822
Ch. 12a, sec. 142		823
Ch. 23, secs. 152-154, 200		159
Ch. 23, secs. 155, 176		161
Ch. 23, sec. 176, subd. 1		156
Ch. 32, sec. 26		729
Ch. 73, sec. 74		171
	1907.	
Ch. 13, art. I, sec. 44		373
Ch. 13, art. I, sec. 64		373
Ch. 13, art. III, sec. 101		657
Ch. 14, art. I, sec. 87		80
Ch. 23, secs. 221, 238		128
Ch. 23, secs. 244, 245, 288-290		337
Ch. 23, sec. 283		254
Ch. 23, sec. 284		256
Ch. 26, art. I, sec. 151		68

	PAGE
Ch. 26, art. I, secs. 155, 159	66
Ch. 32, sec. 26	619
Ch. 36	706
Ch. 36, sec. 2	712
Ch. 37, sec. 5	795
Ch. 50	112, 377
Ch. 50, secs. 5, 8, 10, 15, 16, 17	464
Ch. 50, secs. 6, 10, 11, 13, 14	458
Ch. 50, secs. 11, 20	455
Ch. 50, sec. 14	657
Ch. 50, sec. 18	465
Ch. 50, secs. 20, 25, 29	459
Ch. 50, secs. 21, 22, 24, 26, 30a, 30b, 30g, 39	466
Ch. 50, sec. 25	119
Ch. 50, sec. 29	21
Ch. 53, sec. 4	627
Ch. 72, art. I, sec. 1	190
Ch. 78, secs. 87-89	554
Ch. 91a, art. II, sec. 1	448

CODE.

Sec. 55	815
Sec. 60	731
Sec. 65	816
Sec. 136	764
Sec. 144	801
Sec. 145	225
Sec. 329	234, 563
Sec. 356	638, 644
Secs. 454, 455	502
Sec. 463	503
Sec. 623	340
Sec. 675d	523
Secs. 925, 932	731
Secs. 966, 967	636

CRIMINAL CODE.

Sec. 260	372
Sec. 324	656

UNITED STATES.

STATUTES AT LARGE.

March 3, 1875, vol. 18, p. 482, ch. 152	682
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CASES DETERMINED
IN THE
SUPREME COURT OF NEBRASKA
AT
SEPTEMBER TERM, 1908.

NICHOLS & SHEPARD COMPANY, APPELLEE, V. FRANK
STEINKRAUS, APPELLANT.

FILED DECEMBER 17, 1908. No. 15,425.

1. Trial: VERDICT: FAILURE TO OBJECT. In an action upon a promissory note, the execution of which was admitted, and the defense was fraudulent misrepresentations of fact and breach of warranty as to the quality of the property for the purchase price of which the note was given in part, the court instructed the jury that their finding should be in favor of plaintiff upon its cause of action for a specified sum, being the principal and interest due upon the note. The jury returned a verdict finding the amount due plaintiff to be 10 cents less than the sum named by the court in the instruction. No objection was made to the verdict, and the erroneous computation was not called to the attention of the court until after judgment had been rendered. *Held*, That the objection came too late; that, if the jury made an error of 10 cents in computing the interest, the attention of the court and jury should have been called to the fact, if at all, before the discharge of the jury, in order that the verdict might be referred back and the proper computation made.
2. Costs, Taxation of: FAILURE TO EXCEPT: REVIEW. The action having been instituted in the district court, and the verdict and judgment having been found and entered for \$200, which was within the jurisdiction of a justice of the peace, the defendant moved the court for a retaxation of the costs, taxing plaintiff's costs to it. The motion was sustained, and the costs so taxed, and to which no exception was taken. *Held*, No error, and that the action of the court was final and could not be reviewed in the supreme court.

3. **Appeal: INSTRUCTIONS: HARMLESS ERROR.** An instruction given by a court to the trial jury, which, if wrong, could not have been prejudicial to the party complaining, will not be examined upon a hearing on appeal.
4. **Instructions based upon the issues and evidence, if reflecting them correctly, are not erroneous.**
5. **Appeal: VERDICT: EVIDENCE.** The jury being the sole judges of the weight of the evidence, their verdict will not be set aside if sustained by any reasonable construction of the evidence.

APPEAL from the district court for Lancaster county:
LINCOLN FROST, JUDGE. *Affirmed.*

Berge, Morning & Ledwith, for appellant.

Billingsley & Greene, contra.

REESE, C. J.

This is an action upon a promissory note for \$200, bearing date March 10, 1904, with interest at 6 per cent. per annum from its date. The suit was instituted in the district court for Lancaster county, as the accumulation of interest, if computed, would render the action beyond the jurisdiction of a justice of the peace.

The defendant answered, admitting the execution of the note, but alleging as defenses: First. That the note was given as a part of \$550 agreed to be paid as the difference between the price of two traction engines exchanged by the parties, and that at the time of the exchange plaintiff represented that the engine traded to him was sound and in good working order in every particular, fit and suitable for the purpose for which he desired to use it; that the representations were untrue and false, and known to be so when made, but unknown to defendant; and that defendant relied upon and believed the same, and would not have made the exchange but for the representations. Second. That at the time of the exchange and the execution of the notes plaintiff warranted said engine to be in good working order and in good con-

dition in every particular, and in all respects suitable and fit for good work as a traction engine; and defendant relied upon such warranty. Third. That the engine was not sound and suitable for the work intended, but was defective, specifying the particulars in which it was claimed the defects existed, and which were unknown to defendant at the time of the exchange, and that said engine was worth no more than the one given plaintiff in exchange; that as soon as defendant discovered the defects in said engine he notified and requested plaintiff "to make it right, but plaintiff denied that there was anything wrong with said engine, and refused to do anything in the matter of repairing and making the same according to representations"; that he had paid the sum of \$50 on the note in suit, and at the time requested plaintiff to make good to him the damage he had sustained, but plaintiff had refused so to do, and refused to accept or receive said engine when its return was offered by defendant; and that defendant had been damaged by the fraudulent representations in the sum of \$550.

To this answer plaintiff replied, first, by general denial; second, by setting up the contract entered into at the time of the exchange; third, that by reason of the terms of said contract defendant was estopped to avail himself of the matter alleged in the second defense set up in the answer.

A jury trial was had, which resulted in a verdict being returned finding for the plaintiff on its cause of action for \$235.75, and in favor of defendant on his cause of action in the sum of \$35.75, and assessing the amount of plaintiff's recovery at \$200, an amount equal to the face of the note without the addition of interest. Defendant moved a motion for a new trial. Plaintiff filed a motion, moving the court "to enter judgment herein for the plaintiff for the sum of \$235.75, or set aside the verdict of the jury in so far as the finding of \$35.75 in favor of defendant is concerned, and grant plaintiff a new trial upon the cross-action of defendant," assigning a number of grounds

therefor. Both motions were overruled, and judgment was rendered upon the verdict, to which exceptions were entered. Plaintiff also filed a motion for judgment for the sum of \$200.10 allowing the finding in defendant's favor for \$35.75 to stand, and alleging that the true amount due on the note at the time of the return of the verdict was \$235.85. This motion was overruled, and exception was duly taken.

In the instructions given to the jury, the court directed them to find that there was due plaintiff on its cause of action the sum of \$235.85, and then determine the amount of damages due defendant, if anything, and find for plaintiff or defendant according as the balance might be. This the jury did not do, but found the amount due plaintiff to be \$235.75, as above stated. If the true amount due upon the note was in fact \$235.85, which we do not determine, the attention of the court should have been called to the error at the time of the return of the verdict, in order that the question might be referred back to the jury for the correct computation. A failure to do this must be considered as a waiver of the error, if one had been made. As the motion was not made until after judgment, and in view of the very slight error, if any was made, we must hold that it came too late, and that there was no error in the action of the court.

Defendant then filed a motion to retax plaintiff's costs, and require plaintiff to pay its own costs, amounting to \$82.47, on the ground and for the reason that plaintiff did not recover more than \$200. This motion was sustained, and the costs named were taxed to plaintiff. To this ruling no exception was taken, and under the well-recognized and established rules of practice we must treat the action of the district court as final. This leaves the case to be disposed of upon the appeal of defendant.

It is contended that the court erred in giving instruction numbered 6, given upon the court's own motion. The instruction is too long to be here copied. Defendant testified that, in order to induce him to sign the written order

7

or contract to which he placed his name at the time of the exchange of the engines, he accepted the statements of plaintiff's agents as to its contents, without reading it, giving as his reason therefor that there was not sufficient light, and that, had he read it, he would not have understood its terms; he being of foreign descent, and not sufficiently familiar with the English language to comprehend the meaning of parts of the instrument, and that the printing was made with very small type. The contract contained the provisions that "second-hand machinery, and machinery not built by Nichols & Shepard Company, is not warranted"; that "no representations or guarantees have been made by the salesman on behalf of Nichols & Shepard Company, which are not herein expressed"; also, that defendant would "not hold Nichols & Shepard Company responsible for any agreement not expressed in this order," and the further provision under the word "Notice" that "no general or special agent or local dealer is authorized to make any change in this warranty." He also testified that, not being able to read and understand the contract, he relied upon the warranty and representations made by plaintiff's agents, which were different from those contained in the written contract which he signed. The instruction complained of submitted the questions of fraud and warranty to the jury, also the condition as to light, the circumstances, etc., under which the contract was signed, and the contention of defendant that the representations and warranty alleged to have been made were made to him verbally, and that, if plaintiff practiced fraud upon defendant in the manner claimed by him, he would not be bound by the writing, but closing with the sentence: "In this particular you are instructed that a man before signing a paper should exercise reasonable care to learn what is contained in said paper by reading it himself, or, if he cannot read it understandingly, by having it read to him." This latter part of the instruction is objected to as being erroneous. As we view the case, the addition of the quoted words, whether correct or

Ververka v. Fullmers.

incorrect, could work no prejudice to defendant. The verdict of the jury is in his favor for the amount of damages which they found he had sustained by reason of the failure of the engine to comply with the warranty and representations of plaintiff's agents. In order to do so, they must have adopted defendant's theory as to entering into the contract as disclosed by his evidence, and therefore the instruction, if erroneous, did him no harm. This being true, we do not deem it necessary to examine the instruction.

Objections are made to other instructions, given by the court, but we are unable to see that they are meritorious. They are governed by the pleadings and evidence, and fairly submitted the case to the jury. We have read the pleadings, evidence and instructions, and must be content with saying in this general way that we find no error in the proceedings. If there has been a miscarriage of justice, the fault must rest with the jury in not properly considering all the evidence and giving it the weight to which it may have been entitled. They being the sole judges in these particulars, we cannot molest their finding.

It follows that the judgment of the district court should be and is

AFFIRMED.

JAMES VERVERKA, APPELLEE, v. WILLIAM P. FULLMERS ET AL., APPELLANTS.

FILED DECEMBER 17, 1908. No. 15,377.

Appeal: DISMISSAL. Courts are not organized to determine mere abstractions, and will ordinarily refuse, on their own motion to proceed in a case which involves only a right which has ceased to exist. In the instant case, in view of the fact that this court has heretofore entertained and determined appeals taken by the parties in interest from the judgment of a district court allowing or refusing a license for the sale of intoxicating liquor, we have ignored the rule above referred to, and examined the record and briefs of the several parties and the evidence.

Ververka v. Fullmers.

contained in the bill of exceptions, and find no legal questions presented not heretofore determined, and the judgment of the district court fully supported by the evidence.

APPEAL from the district court for Jefferson county:
WILLIAM H. KELLIGAR, JUDGE. *Affirmed.*

W. J. Moss, for appellants.

John C. Hartigan and *W. H. Barnes*, *contra.*

DUFFIE, C.

This is an appeal from the judgment of the district court for Jefferson county, entered on the 16th day of July, 1907, affirming the action of the village board of the village of Daykin in granting a license to appellee to sell malt, spirituous and vinous liquors in said village for the remainder of the municipal year of 1907. The municipal year for which the license was granted expired on the first Tuesday of May, 1908. This being the case, any decision which we might render would not affect the parties. The appellee's license has expired, and no further rights under it can be claimed. Time has accomplished all that the remonstrator could ask of the court. It has canceled the appellee's license. In this condition of the case, we think the appeal should be dismissed. Courts are not organized to determine mere abstractions, and will refuse, on their own motion, to proceed in a case which involves only a right which has ceased to exist. *Cutcomp v. Utt*, 60 Ia. 156. As said by Judge Day in *State v. Porter*, 58 Ia. 19: "The court ought not to be required to spend its time in the accumulation of a bill of costs, for no other purpose than that of determining which party should pay them." Notwithstanding this view of the case, we have examined a voluminous record, and find no legal questions presented for our determination that have not already been decided in former cases. The rights of the parties depend wholly upon questions of

In re Estate of Andersen.

fact, which, we think, were correctly decided by the district court.

We recommend an affirmance of the judgment.

EPPERSON and GOOD, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

IN RE ESTATE OF JENS ANDERSEN.

ANE MARIE ANDERSEN ET AL., APPELLANTS, V. CHRIS S. BORGAARD, EXECUTOR, ET AL., APPELLEES.

FILED DECEMBER 17, 1908. No. 15,381.

Wills: DEVISE: CROPS. Unless reserved, crops standing upon the ground, matured or not, pass to the grantee named in a deed of conveyance, or to a party to whom the land is devised.

APPEAL from the district court for Kearney county: ED L. ADAMS, JUDGE. *Affirmed.*

J. L. McPheely, for appellants.

Lewis J. Paulson, contra.

DUFFIE, C.

Does a crop of corn which has matured, but which remains ungathered upon the stalks, pass to a devisee of the land, or is it personal property in such a sense that it passes under a paragraph of the will devising personal property? The question arises in this way: Jens Andersen departed this life November 27, 1905, in Kearney county, Nebraska. His last will and testament, bearing date August 14, 1902, was duly admitted to probate December 27, 1905. He left surviving him three nephews and five nieces. The nephews resided in Kearney county, and his nieces resided in the kingdom of Denmark. To

In re Estate of Andersen.

each of his nephews he devised 80 acres of land, and the remainder of his estate he left to his nieces, the bequests being as follows: "I give, devise and bequeath unto my beloved nieces now living in Roskelda, Denmark, whose names are as follows: Karen Marie Andersen, Kestine Andersen, Ane Marie Andersen, Maren Andersen and Sise Marie Andersen, the remainder of all my property of whatever nature, share and share alike, to be divided after my death and sold and the proceeds to go to the aforesaid nieces, share and share alike." The three 80-acre tracts devised to the nephews were occupied by tenants, who had planted corn on a portion thereof, which at the time of the testator's death it is agreed had matured but which had not been gathered. The nieces made claim to the landlord's share of the crop, upon the theory that the same was personal property, and did not pass to the nephews, who took title to the land under the will of the testator. The probate court awarded the corn to the nephews, and on appeal the district court affirmed the holding. The nieces have appealed.

We may regard it as settled in this state that annual crops growing on the land do not pass to the purchaser at judicial sale. *Aldrich v. Bank of Ohiowa*, 64 Neb. 276; *Foss v. Marr*, 40 Neb. 559; *Monday v. O'Neil*, 44 Neb. 724. These cases appear to be based upon *Beggs v. Thompson*, 2 Ohio, 95, and *Cassilly v. Rhodes*, 12 Ohio, 88. That this rule does not obtain between grantor and grantee is evident from what is said by the court in *Cassilly v. Rhodes*. The first paragraph of the opinion is in the following words: "If the question were between the grantor and grantee, whether growing crops, annual or other, pass by a deed of sale, it would be of easy solution. They are not, technically, 'emblems' but 'issues' or 'profits,' and part of the land, while in the owner's hands, and, unless excepted, pass by the deed, because it is construed most strongly against him who makes it." That this is the rule of the common law is asserted by all textwriters. 1 Kerr, Real Property, sec. 50, says: "Growing crops planted by

the owner of the soil are a part of the realty, and, as a general rule, will pass with it on conveyance, even though reserved by parol by the grantor at the time of sale. And this seems to be the case even though the crops are at the time standing in the field unharvested, although ripe, and the season for gathering them is long past." Ohio and Pennsylvania are named by the author as two states where growing crops are held to be personal property to the extent that a parol reservation made by the grantor will be enforced, but even in these states, if no reservation of the crops are made either in the deed or by parol, the crop passes to the grantee. It is said in 4 Kent, Commentaries, p. *468: "If the land be sold without any reservation of the crops in the ground, the law is strict as between vendor and vendee; and I apprehend the weight of authority to be in favor of the existence of the rule that the conveyance of the fee carries with it whatever is attached to the soil, be it grain growing, or anything else, and that it leaves exceptions to the rule to rest upon reservations to be made by the vendor." In *Baker v. Jordan*, 3 Ohio St. 438, the vendor made parol reservation of a crop of corn upon the land. The court enforced the reservation in favor of the vendor. It said: "A deed purports to convey the realty. But what is the realty? Growing corn may be part of it, for some purposes, but it is generally to be considered as personalty. If the parties to a deed, either by words or their behavior, signify their understanding, that as between them it is personalty, the law will so regard it, and will respect their intention in the construction of the deed. When the evidence of such understanding is produced, it is not to contradict the deed, for with that it is perfectly consistent; but it is to show that what in some instances would go with the lands as part of the realty was, in that case, converted into personalty by the will of the parties, and thus to hold the deed to its true meaning and effect." While holding that the reservation might be shown by parol, the court in opening its opinion said "That growing corn will pass by common deed of the land

whereon it grows, when no valid conversion of it into personalty is shown to have preceded the conveyance, cannot be doubted." In *Tripp v. Hasceig*, 20 Mich. 254, it is held: "Ripe crops, although no longer drawing nourishment from the ground, will, if still unsevered, pass by a conveyance of the land." In the body of the opinion it is said: "We concur in the suggestion of the circuit judge that whether the corn would pass or not could no more depend upon its maturity or immaturity than the passage of a standing forest tree by the conveyance of the land, would depend upon whether the tree was living or dead." Numerous authorities are cited in the opinion showing this to be the rule of the common law. To the same effect is *Damery v. Ferguson*, 48 Ill. App. 224.

We have no statute such as obtains in some of the states, notably New York and Ohio, making crops, growing on the land of a decedent at the time of his death, assets going to the executor or administrator to be applied and distributed as part of his personal estate. Even were such a statute in force in this state, we would have to hold, if we followed the court of appeals of New York, that growing crops passed to the devisee, if not necessary to pay debts existing against the estate or legacies under the will of the deceased. *Bradner v. Faulkner*, 34 N. Y. 347. In the body of the opinion it is said: "In this case there seems to have been no debts, and the sale of this wheat, it is not pretended or claimed, was necessary for the payment of legacies. When it legally appeared that this wheat was not necessary for the payment of debts or legacies, the executor should then dispose of it as directed by the will. To whom, then, did the wheat ultimately belong? * * * At common law, crops growing on land passed to the devisee of the land. This was conceded on the argument. They passed to the devisee upon the presumed intention of the testator, that he who took the land should take the crops which belong to it."

We think it is well settled that as between grantor andantee, or devisee and the executor, or an heir of the

deceased, crops growing upon lands conveyed by deed or devised by will pass to the vendee or devisee. "Emblements are corn and other crops of the earth which are produced annually, not spontaneously, but by labor and industry, and for this reason are called '*fructus industriales*.' They are chattel interests, which go to the executor as against the heir of the testator, but not usually as against the devisee of the land on which they are growing at the death of the testator. As between the devisee of the land and the executor the matter is one wholly of intention. If there is no clear evidence of an intention in the will that the testator intended emblements to go to the executor, they will pass with the land devised, upon the theory that the testator would not have given land away from his heir without also giving those things which would make it more valuable to the devisee. This presumption in favor of the devisee is rebuttable by showing an express or implied specific gift of the emblements to some one else, though not by a mere residuary clause." Underhill, Law of Wills, sec. 306, and cases cited. Relating to the executor's right of possession of the land devised to the nephews, we do not think that it can change the right of the parties to this action.

We are urged to hold that a fully matured crop, although standing on the ground, is personal property, which does not pass with a conveyance or devise of the land. We do not think that this rule should obtain. If the grantor or testator intends to reserve a crop standing upon the land, it is easy to make such reservations; whereas, to hold that the question of whether the crop passed with a deed or devise of the land depended upon whether the crop had fully matured would raise numberless controversies as to the condition of the crop at the time of the conveyance. In adopting a rule it is always better that it should be such that no controversy is likely to arise over its application. We hold therefore that, until a crop is severed from the land upon which it is grown, it is such part of the real estate as will pass by a

State v. Several Parcels of Land.

deed of conveyance or by a devise of the land, unless reservation thereof is made in the deed, or there is evidence contained in the will of the testator that the devisee of the land should not be entitled to the crop.

In the present case there was a large amount of personal property left after paying all claims against the estate. This, together with 240 acres of land, was devised to the five nieces, share and share alike. We find nothing in the will that indicates any intention on the part of the testator to convert the corn crop growing upon the tracts devised to his nephews into personal property that it should pass to his nieces as such, and we hold therefore that the district court correctly held that it passed to the nephews as a part of the land devised to them.

We recommend an affirmance of the judgment.

EPPELSON and GOOD, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

**STATE OF NEBRASKA, APPELLEE, V. SEVERAL PARCELS OF
LAND (WIMAN), APPELLANT.**

FILED DECEMBER 17, 1908. No. 15,243.

1. **Statutes: CONSTRUCTION: TAXATION: IRREGULARITIES.** Statutory provisions with reference to special assessments are strictly enforced, but liberally construed with reference to general taxes, when an irregularity complained of has not been prejudicial.
2. **Constitutional Law: TAXATION.** Irregularity in the process of taxation can be said not to amount to due process of law, only when the proceedings are arbitrary, oppressive or unjust.
3. ———: ———: **NOTICE.** To constitute due process of law it is not necessary that notice be given of each step in the process of taxation. It is sufficient if the taxpayer has an opportunity to appear, at some time, before a tribunal having jurisdiction, and there procure an adjustment of his liabilities.

APPEAL from the district court for Douglas county:
ABRAHAM L. SUTTON, JUDGE. *Affirmed.*

W. H. Herdman and W. A. Saunders, for appellant.

Harry E. Burnam, I. J. Dunn and John A. Rine, contra.

EPPERSON, C.

The trial court ordered a sale of appellant's property under the provisions of the scavenger act, finding that the regular taxes for the years 1894, 1895, 1896 and 1897 of the city of Omaha were liens upon appellant's property. Before decree appellant answered, alleging that the taxes were illegal because of the insufficiency of the notices of the meetings of the board of equalization. There is no contention that the taxes were unjust or inequitable, or levied for an unlawful or unauthorized purpose, or exceeded the constitutional and statutory limitations. The question of due process of law is involved. The notices of the meetings of the board of equalization for the years 1895, 1896 and 1897 were each published in two papers printed in the English language, and one printed in the German language. This was an irregularity. Each notice should have been published in three English papers. The notice of equalization upon which the 1894 tax was levied was published six consecutive days, but the last publication was four days prior to the meeting of the board. Section 85, ch. 12a, Comp. St. 1893, which was in force at the times in controversy, provided in part: "The city clerk shall complete the assessment roll for the city on or before the second Monday in October of each year, unless otherwise ordered by the council, and when such roll is completed, the council shall hold a session of not less than five days, as a board of equalization, giving notice of said sitting for at least six days prior thereto in three daily papers of the city. The mayor and council shall make the annual levy at the first regular meeting of the city council in February of each year." It has been

State v. Several Parcels of Land.

held that the notice must be published six days immediately prior to the convening of the board. *Leavitt v. Bell*, 55 Neb. 57; *Medland v. Connell*, 57 Neb. 11; *Wakeley v. City of Omaha*, 58 Neb. 245. The above construction was placed on the statute in cases where special assessments were involved. It is not our purpose to reaffirm the above rule, but for the purposes of this opinion we assume that the rule was properly applied in the cases cited. There are reasons for holding that a strict adherence to the statutory provisions regarding notice is necessary in order to make valid a special assessment, equalization and levy, which cannot be said to apply to proceedings for the equalization and levy of regular or general taxes. Statutory provisions with reference to special assessments are usually strictly adhered to, but liberally construed as to regular taxes, unless an actual wrong is done. "Laws for the assessment and collection of general taxes stand upon a somewhat different footing and are construed with the utmost liberality, sometimes even to the extent of holding that no notice whatever is necessary." *Turpin v. Lemon*, 187 U. S. 51. In the case of special taxes, the amount thereof is based upon an assessment, not of the actual value, but of benefits to the property involved. The board of equalization assess the benefits upon the consideration of evidence adduced upon a hearing or trial. The value of the property is immaterial. The law imposes regular taxes annually upon all property according to the principles of equality and uniformity, in return for which the taxpayers all alike receive the protection of the law and other benefits of our government. In the case of regular or general taxes, the assessment is made by the assessor of the actual value of the property, and without notice to the taxpayer, and before the statutory notice of the meeting of the board of equalization is required. The assessment stands as the basis for the distribution of the burden of taxation, unless changed by the board of equalization, or otherwise, as provided by statute. In such cases the authority of the

board of equalization to act does not necessarily depend upon notice to be given to the taxpayer, unless it is sought to raise the assessed valuation of his property over that fixed by the assessor, and even then the general published notice would be insufficient. The valuation of the property had been previously fixed by proceedings which operated alike upon all property. The object of the statutory notice complained of in this case is to give an opportunity to the taxpayer to appear and show that his property was valued too high by the assessor, or that other property in the district has been valued too low. Relief asked of a board of equalization is in the nature of an appeal from the judgment of the assessor; and, unless it is pointed out that the assessor committed some prejudicial error, a denial of an appeal cannot be said to be a denial of due process of law. The case would be different if the appellant herein was contending that his property was assessed too high, or if he was in any way the victim of discrimination or irregularity; but no such complaint is made. He simply alleges that he was denied due process of law because the notice of the meeting of the board of equalization was not published strictly as required by statute, or, in other words, that he was denied an appeal from an assessment, which we must presume was legal. "It is only where the proceedings are arbitrary, oppressive or unjust that they are declared to be not due process of law." *Glidden v. Harrington*, 189 U. S. 255. At most, the defects in the notices, so far as they relate to the equalization of general taxes, must be considered as irregularities only, and insufficient alone to avoid the levy.

Again, it cannot be said that due process of law is lacking, in proceedings for taxation, although the statutory notice is omitted at some particular stage, if the maxims of the law provide an alternative remedy which is sufficient to correct any wrong done. As a safeguard for the protection of a taxpayer, our legislature made provisions, now appearing as section 11061, Ann. St. 1907, which

gives to a taxpayer the right to an injunction in the event that the objectionable tax, or some part thereof, be levied or assessed for an illegal or unauthorized purpose. It further provides that, if such person claims the tax, or some part thereof, to be invalid for the reason that the property upon which it was levied was not liable to taxation or that such property had been twice assessed during the same year, he may pay the same under protest, and recover the amount from the municipality; or, if for any reason the taxes are invalid, he may obtain judgment in a court having jurisdiction, with interest, from the municipality making the invalid levy. Under these provisions an adequate remedy is awarded to whomsoever may be denied the right of appearing before the board of equalization, if he is injured thereby. It is not necessary to constitute due process of law that notice of each step of the process of taxation be given. It is sufficient that the taxpayer have an opportunity to appear, at some time, before a tribunal having jurisdiction, and there procure an adjustment of his liabilities.

In *Security Trust & Safety Vault Co. v. City of Lexington*, 203 U. S. 323, it was held that the failure of the city to require a notice of a special assessment for back taxes to the taxpayer does not deprive him of his property without due process of law, where the state court has afforded him an opportunity to be heard on the question of the validity and the amount of the taxes. In the opinion we find the following: "But in this case the state court has afforded to the taxpayer full opportunity to be heard on the question of the validity and amount of the tax, and after such opportunity has rendered a judgment which provides for the enforcement of the tax as it has been reduced by the court, the reduction amounting to over five thousand dollars. The plaintiff has, therefore, been heard, and on the hearing has succeeded in reducing the assessment. What more ought to be given? * * * The state court in this case has held the taxpayer entitled to a hearing and has granted and enforced such right, and

State v. Several Parcels of Land.

upon the trial has reduced the tax. In so doing the court below has not assumed the legislative function of making an assessment. It has merely reduced, after a full hearing, the amount of an assessment made by the assessor under color at least of legislative authority." In *McMillen v. Anderson*, 95 U. S. 37, Mr. Justice Miller said with reference to a license tax levied by the state of Louisiana: "It seems to be supposed that it is essential to the validity of this tax that the party charged should have been present, or had an opportunity to be present, in some tribunal when he was assessed. But this is not and never has been, considered necessary to the validity of a tax. * * * Nor is the person charged with such a tax without legal remedy by the laws of Louisiana. It is probable that in that state, as in others, if compelled to pay the tax by a levy upon his property, he can sue the proper party, and recover back the money as paid under duress, if the tax was illegal." The same jurist, in *Davidson v. New Orleans*, 96 U. S. 97, said: "It is not possible to hold that a party has, without due process of law, been deprived of his property, when, as regards the issues affecting it, he has, by the laws of the state, a fair trial in a court of justice, according to the modes of proceeding applicable to such a case." In *King v. Portland City*, 184 U. S. 61, it is said: "The manner of notice and the specific period of time in the proceedings when he may be heard are not very material, so that reasonable opportunity is afforded before he has been deprived of his property or the lien thereon is irrevocably fixed. So it has been held that it is sufficient if the party is accorded the right of appeal or to be heard upon an application for abatement (see *Towns v. Klamath County*, 33 Or. 225; *Weed v. Boston*, 172 Mass. 28), or the assessment is to be enforced by a suit to which he is to be made a party (*Hagar v. Reclamation District*, 111 U. S. 701; *Walston v. Nevin*, 128 U. S. 578), or the right of injunction against collection is accorded, by which the validity of the assessment may be judicially determined. *McMillen v. Ander-*

Woods v. Varley.

son, 95 U. S. 37. In such case he cannot be heard to complain that his property is being taken without due process of law."

Under the doctrine of the United States supreme court, and consonant with sound reasoning, it would appear that a taxpayer, who has the opportunity, before the amount of general taxes was finally fixed and determined, to show to a board of equalization or to a court of competent jurisdiction, empowered to make an adjustment of the amounts equitably and legally due, that the assessment of his property was unjust or excessive or arbitrary, cannot complain that his property is being taken without due process of law.

We recommend that the judgment of the lower court be affirmed.

DUFFIE, GOOD and CALKINS, CC., concur.

By the Court: For the reasons given in the foregoing opinion, the judgment of the district court is

AFFIRMED.

FAWCETT, J., dissents.

JAMES WOODS ET AL., APPELLANTS, V. PETER VARLEY,
APPELLEE.

FILED DECEMBER 17, 1908. No. 15,823.

Intoxicating Liquors: LICENSE. A movable screen maintained in the front of a saloon sufficient to obstruct a view of the interior through the door or window is a violation of the screen law. Section 7179, Ann. St. 1907.

APPEAL from the district court for Colfax county:
GEORGE H. THOMAS, JUDGE. *Reversed with directions.*

C. J. Phelps, for appellants.

W. M. Cain, Albert S. Ritchie and Charles L. Fritscher,
contra.

EPPERSON, C.

In the spring of 1908 the appellee filed his application with the city council of Schuyler for a liquor license for the municipal year ending May 4, 1909. Appellants remonstrated, alleging that the applicant, as a licensee, during the preceding year had kept the doors and windows of his place of business obstructed, thereby preventing a clear and open view into his saloon; and, further, that during the preceding year the appellee had been guilty of selling intoxicating liquor to certain minors. Appellee maintained a movable screen in the front part of his saloon which was sufficient to obstruct a view of the interior through the door and window. Although at certain places substantially all the interior could be observed, yet the screen did furnish a hiding place, and could be moved to suit the convenience of the proprietor. Presumptively the screen was used to answer the purposes for which it was made. Its maintenance was a violation of the law.

We recommend that the judgment be reversed and the cause remanded, with instructions to the district court to enter a judgment canceling the license.

DUFFIE and GOOD, CC., concur.

By the Court: For the reasons given in the foregoing opinion, the judgment is reversed and the cause remanded, with instructions to the lower court to enter an order canceling the license.

REVERSED.

HENRY BOLTON ET AL., APPELLANTS, V. MATHEW BECKER
ET AL., APPELLEES.

FILED DECEMBER 17, 1908. No. 15,826.

Intoxicating Liquors: LICENSE. Under the provisions of section 29 of the Slocumb law (Comp. St. 1907, ch. 50), it is a misdemeanor for a licensed vendor of intoxicating liquors to obstruct either his doors or windows by the use of screens, blinds, paint, or other articles; and one who during the previous year has been guilty of a violation of said section is not a proper person to receive a liquor license.

APPEAL from the district court for Colfax county:
GEORGE H. THOMAS, JUDGE. *Reversed with directions.*

C. J. Phelps, for appellants.

W. I. Allen and *W. M. Cain*, *contra*.

EPPERSON, C.

By remonstrance the appellants objected to the issuance of a liquor license to the appellees because they, as former licensees, had violated section 29, ch. 50, Comp. St. 1907, by failing to keep the windows and doors of their place of business unobstructed by screens. The building where they had been doing business faced the north. On either side of the front door was a large glass window. The counter was near the east wall, and ran to within about 10 feet of the north window. Against the north end of the counter, and forming a right angle therewith, was a screen 32 or 48 inches wide. In the west wall of the building, and next to an alley, were two windows at which curtains were maintained, which were sometimes drawn and sometimes open. The evidence shows that one standing on the sidewalk at the north end of the building could look through the east window and see the bar, but could not see the space in front of the bar, except at the extreme south end thereof; that, looking through the

Woods v. Krivohlavek.

glass front door, one could not see the space in front of the bar. This difficulty would have been entirely obviated had it not been that the applicant permitted the pasting of advertising bills over the window west of the door. Such bills at times entirely obscured the view from without from that position. By reason of these bills and the screen set at the end of the bar, it was impossible to observe the interior of the saloon. Of course, one by going down the alley could look through the windows in the west wall, if the curtains were open. There was substantially no conflict in the testimony. It is true that one witness testified that he was able to see the entire interior of applicant's saloon. He had made an inspection, and at a time when, no doubt, the bills and the screen had been removed. The conduct of the applicant is clearly within the inhibition of the statute.

We recommend that the judgment of the district court affirming the order of the city council granting the license be reversed and this cause remanded, with directions to the lower court to enter judgment canceling said license.

DUFFIE and GOOD, CC., concur.

By the Court: For the reasons given in the foregoing opinion, this cause is reversed and remanded to the lower court, with instructions to enter an order canceling the license granted by the city council.

REVERSED.

JAMES WOODS ET AL., APPELLANTS, V. JOSEPH KRIVOHLAVEK
ET AL., APPELLEES.

FILED DECEMBER 17, 1908. No. 15,827.

Intoxicating Liquors: LICENSE. A screen maintained in the front of a saloon sufficient to obstruct a view of the interior through the door or window is a violation of section 29 of the Slocumb law (Comp. St. 1907, ch. 50).

APPEAL from the district court for Colfax county:
GEORGE H. THOMAS, JUDGE. *Reversed with directions.*

C. J. Phelps, for appellants.

W. M. Cain, *contra*.

EPPELSON, C.

Appellants as remonstrators opposing appellee's application for liquor license, among other things, alleged a violation of section 29 of the Slocumb law (Comp. St. 1907, ch. 50). The evidence shows that applicant had during the previous year maintained a stationary screen four feet wide and six feet high, at right angles with the bar, near the front of his saloon. The evidence in this case as to the effect of this screen as an obstruction is similar to that in *Woods v. Varley*, *ante*, p. 19, and is governed by the same rule.

We recommend that the judgment be reversed and this cause be remanded, with instructions to the lower court to enter a judgment canceling the appellees' license.

DUFFIE and GOOD, CC., concur.

By the Court: For the reasons given in the foregoing opinion, the judgment is reversed and the cause remanded, with instructions to the lower court to enter an order canceling the license.

REVERSED.

FRANK H. WOODS, APPELLANT, V. LINCOLN TRACTION COMPANY, APPELLEE.

FILED DECEMBER 17, 1908. No. 14,584.

1. **Nuisance: INJUNCTION.** It is essential to the right of an individual to relief by injunction against a public nuisance that he should show that he has suffered or will suffer some special injury other than that in which the general public shares, and the difference between the injury to him and the public must be one of kind,

Woods v. Lincoln Traction Co.

and not merely of degree. *Ayers v. Citizens R. Co.*, p. 26, *post*, approved and followed.

2. **Costs:** **INJUNCTION:** **REVIEW.** This court will not reverse an order of the district court taxing the costs of an injunction suit to the defendant, if it appears that at the time suit was begun defendant's failure to comply with the terms and provisions of the city ordinance constituted valid ground for injunction, and that defendant after the action was begun removed the ground for injunction by complying with the terms and provisions of the ordinance.

APPEAL from the district court for Lancaster county:
ALBERT J. CORNISH, JUDGE. *Affirmed.*

Hall, Woods & Pound, for appellant.

Clark & Allen, *contra*.

GOOD, C.

Frank H. Woods, who owned certain lots located at the corner of and abutting on Ninth and Q streets in the city of Lincoln, brought this action to enjoin the Lincoln Traction Company from constructing a line of street railway in front of his said lots on said streets. The case was tried on its merits, and judgment entered dismissing plaintiff's cause of action and taxing the costs to defendant. Plaintiff and defendant have both appealed; the former from the order of dismissal, and the latter from the order taxing the costs to it.

The injunction was asked on the grounds, first, that defendant had no valid franchise or right to build and operate a street railway over said streets; and, secondly, because defendant had not complied with the provisions of an ordinance of said city which requires street railway companies to pay for the cost of paving destroyed in laying their street railway tracks, and to repave between its rails and for the space of one foot on the outside thereof. After the commencement of the action, and before trial, the defendant complied with the ordinance. The record shows that for a long time the defendant had owned and

operated a street railway in the city of Lincoln, and that it claimed to have acquired by purchase the franchise and rights originally granted to the Standard Street Railway Company, the Lincoln Street Railway Company, and the Lincoln Electric Railway Company. At the time this action was brought defendant was constructing a line of street railway along a portion of Ninth and Q streets, and was about to build its line of railway in front of plaintiff's property. The record discloses that defendant was and for a long time had been enjoying and exercising whatever rights it had acquired by purchase, and that it relied in good faith on the validity thereof. Defendant had at least a colorable right to construct its lines of street railway over the streets in question. The record does not show that plaintiff will suffer any injury different in kind from that suffered by the public generally. In *Ayers v. Citizens R. Co.*, p. 26, *post*, it is held: "It is essential to the right of an individual to relief by injunction against a public nuisance that he should show that he has suffered or will suffer some special injury other than that in which the general public shares, and the difference between the injury to him and the public must be one of kind, and not merely of degree." So far as the questions presented by plaintiff's appeal are concerned, the case is in all respects similar to that presented in *Ayers v. Citizens R. Co.* The reasoning of that case is applicable to this, and the rules there announced are decisive of the questions presented by plaintiff's appeal. It follows that the judgment of the district court, in so far as it relates to the questions presented by plaintiff's appeal, is right, and should be affirmed.

The defendant's appeal raises the question as to whether the costs were properly taxed to the defendant. At the time the action was brought the defendant had not complied with the provisions of the ordinance, and was not entitled to go upon the streets and build its line of street railway. Plaintiff had a peculiar and personal interest in the paving, which would be destroyed by the building

Ayers v. Citizens Railway Co.

of tracks, and was entitled to protect himself against the proposed invasion of his rights. The action was therefore properly instituted, because defendant had not provided for the payment of the cost of the paving it would destroy, and had not complied with the ordinance requiring it to provide for the repaving between its rails and for one foot on each side thereof. The fact that defendant afterwards complied with the terms of this ordinance removed any ground for injunction, but defendant was not entitled to escape the payment of the costs which were properly incurred on account of its own fault. It should have complied with the ordinance before first attempting to build its street railway. That it complied with the ordinance afterwards will not relieve it from the costs which were incurred. The costs, under the circumstances, were properly taxed to the defendant.

The judgment of the district court is right, and we recommend that it be affirmed.

DUFFIE and EPPERSON, CC., concur.

By the Court: For the reasons given in the foregoing opinion, the judgment of the district court is

AFFIRMED.

BEATRICE GUILD AYERS, APPELLANT, V. CITIZENS RAILWAY
COMPANY, APPELLEE.

FILED DECEMBER 17, 1908. No. 15,203.

Nuisance: INJUNCTION. It is essential to the right of an individual to relief by injunction against a public nuisance that he should show that he has suffered or will suffer some special injury other than that in which the general public shares, and the difference between the injury to him and the public must be one of kind, and not merely of degree.

APPEAL from the district court for Lancaster county:
EDWARD P. HOLMES, JUDGE. *Affirmed.*

Flansburg & Williams, for appellant.

Hainer & Smith and Hall, Woods & Pound, contra.

GOOD, C.

This is an action to enjoin the construction of a street railway in front of plaintiff's residence property which abuts on south Twenty-Ninth street in the city of Lincoln. The injunction is demanded upon the ground that defendant had not obtained the consent of the electors of said city to lay its tracks and construct its lines of railway upon the streets of said city, and that without such consent the defendant was a trespasser. The cause was submitted to the district court upon an agreed statement of the facts. Defendant had judgment, and plaintiff has appealed.

From the agreed statement of facts it appears that the defendant owns and was operating a system of street railways in the city of Lincoln, and that it claimed to have acquired by purchase the rights and franchises originally granted to the Capitol Height Railway Company, the Lincoln Rapid Transit Company, and the Home Street Railway Company. At the time this action was begun defendant was constructing a line of street railway along and over said south Twenty-Ninth street, and was about to construct its line of railway in front of plaintiff's property. The defendant's right to construct and operate street railways over the streets in the city of Lincoln was before this court in *State v. Citizens Street R. Co.*, 80 Neb. 357. It was there said: "Under the circumstances of this case, we do not think it would be a wholesome public policy to hold that, because of the irregularity which occurred in granting the right which the people had power to confer, such irregularity renders all proceedings under the vote void and of no effect." And in that case it was held that the defendant was entitled to the use of the streets it then occupied. It was recognized

that the defendant had at least a colorable right to go upon and use the streets for the construction of a street railway. Plaintiff's theory is that the occupation of the street by the defendant is without any right, and that the construction of its street railway, including its tracks and lines of poles and wires in the street, constitutes a nuisance. It is a general rule that a public nuisance does not furnish grounds for an action in equity by an individual who merely suffers an injury which is common to the public. The courts of this country generally hold that it is essential to the right of an individual to relief by injunction against a public nuisance that he should show that he has suffered or will suffer some special injury other than that in which the general public shares, and the difference between the injury to him and to the public must be one of kind, and not merely of degree. 29 Cyc. 1210-1212; *Placke v. Union Depot R. Co.*, 140 Mo. 634, 41 S. W. 915; *Bischof v. Merchants Nat. Bank*, 75 Neb. 838; *George v. Peckham*, 73 Neb. 794.

It is urged by the plaintiff that the laying of the track and the erection of the poles and wires for the carrying of the electric current will interfere with her ingress and egress to and from her property, and that the poles and wires will impede and obstruct the view from her premises; but the record does not show that a single pole will be placed in front of plaintiff's premises, nor that her ingress or egress to and from her property will in any degree be interfered with or impeded. Plaintiff asserts that she will be injured by reason of the noise incident to the operation of the street railway; but such injury would not be peculiar to the plaintiff, but would be suffered alike by all property owners residing anywhere along the lines of the street railway. It is not apparent from the record that plaintiff will suffer any injury different in kind from that suffered by the public generally. The lines of street railway and poles and wires may inconvenience the plaintiff to a greater degree than the public generally; but the mere fact that plaintiff uses that street

Talmage v. Minton-Woodward Co.

more frequently than others of the public and may suffer more from the alleged nuisance than others does not present a distinct injury. Her injury is the same in character as that which the public will suffer. The only difference is one of degree, and not of kind. The record does not disclose that plaintiff would suffer any such injury as would entitle her to an injunction.

It follows that plaintiff was not entitled to an injunction. The judgment of the district court is right, and should be affirmed.

DUFFIE and EPPERSON, CC., concur.

By the Court: For the reasons given in the foregoing opinion, the judgment of the district court is right and is

AFFIRMED.

JOHN S. TALMAGE ET AL., APPELLEES, V. MINTON-WOODWARD COMPANY ET AL., APPELLANTS.

FILED DECEMBER 17, 1908. No. 15,339.

1. **Assignments: VOID DEED.** A voluntary assignment for benefit of creditors is void, if the deed of assignment is not witnessed and acknowledged.
2. ———: ———: **ORDER OF DISTRIBUTION: VALIDITY.** In proceedings in the county court taken under sections 3500-3545, Ann. St. 1907, relating to assignments for benefit of creditors, if the deed of assignment is void, the order of the county court allowing claims of creditors does not amount to a judgment, and the distribution of the assigned estate and the discharge of the assignee under the orders of the county court in such proceedings do not amount to a judicial exhaustion of the property of the assignor.

APPEAL from the district court for Hall county: JAMES G. REEDER, JUDGE. *Reversed.*

H. Thompson, R. R. Horth, W. A. Prince, Charles

Talmage v. Minton-Woodward Co.

G. Ryan, M. T. Garlow, B. H. Paine and James H. Wooley,
for appellants.

T. O. C. Harrison and O. A. Abbott, contra.

Good, C.

This action was brought by creditors of the Minton-Woodward Company, a Nebraska corporation, against the stockholders of said corporation to enforce their statutory liability by reason of the corporation's failure to annually publish notice of its existing debts, as required by section 4128, Ann. St. 1907. The Minton-Woodward Company was organized for the purpose of carrying on a wholesale mercantile business, and had its principal place of business at Grand Island, in Hall county, Nebraska. During the years 1896 to 1899, inclusive, it published no notice of its existing debts, as required by said section 4128, and during the time that it was in default of notices it became indebted to a large number of creditors. On the 29th of April, 1899, the corporation attempted to execute and deliver to the sheriff of Hall county a deed of assignment for the benefit of its creditors. The corporation placed its property in the hands of the sheriff of said county, and thereafter filed in the county court of said county an inventory of its property with a schedule of its debtors and creditors containing the information required by section 3507, Ann. St. 1907. Thereafter the provisions of the assignment law were followed in all respects as though the deed of assignment had been valid. An assignee was chosen by the creditors of the corporation, to whom the sheriff transferred the property received from the corporation. Under orders of the county court, the property in the hands of the assignee was converted into cash, and the proceeds distributed to the creditors. The amount so distributed was 86 per cent. of the claims filed. Upon the assignee's final report, he was discharged by the county court. Thereafter John S. Talmage and other creditors of the corporation brought this action on

their own behalf and on behalf of all other creditors similarly situated who might choose to join in the action and contribute to the expense thereof. Several answers were filed by different defendants, setting up various defenses, but all of the defendants alleged that the purported deed of assignment was void because it was not witnessed, was not acknowledged before a notary public who was competent to take the acknowledgment, and was not executed by the proper officers of the corporation; and that, by reason of the fact that the assignment was invalid, all of the assignment proceedings in the county court were void, and that the plaintiffs' claims against the corporation had never been reduced to judgment, and that the assets of the corporation had never been judicially exhausted. A trial upon the issues joined resulted in a judgment in favor of the plaintiffs. The defendants against whom judgment was rendered have appealed.

On this appeal many interesting questions of law have been raised which have been ably presented both on the oral arguments and in the briefs, but the conclusion at which we have arrived renders it necessary to consider but one. Section 4128, Ann. St. 1907, requires every corporation created after the passage of said section to annually give notice in some newspaper of the amount of all the existing debts of the corporation, and further provides that, if any corporation shall fail to give notice as required, after its assets are first exhausted, then all the stockholders of the corporation shall be jointly and severally liable for all the debts of the corporation then existing, and for all that shall be contracted before such notice is given, to the extent of the unpaid subscription of any stockholder to the capital stock of such corporation, and to the amount of the capital stock owned by such stockholder. It has been held by this court that, before a cause of action under this section accrues against the stockholders for an amount equal to their stock, claims against the corporation must first be judicially ascertained, and the property of the corporation judicially ex-

Talmage v. Minton-Woodward Co.

hausted. This means, ordinarily, that judgment must be rendered against the corporation, and execution issued thereon and returned unsatisfied; before the right of action accrues. *Globe Publishing Co. v. State Bank*, 41 Neb. 175; *Ball v. Wicks*, 45 Neb. 367. No judgments in actions at law were obtained by the creditors against the Minton-Woodward Company. The only judgments ever obtained against the corporation were in the assignment proceedings wherein the court ascertained the amount of each claim filed. The only judicial exhaustion of the assets of the corporation was by the sale and distribution of the property of the corporation which had been placed in the hands of the assignee.

The plaintiffs contend that the allowance of the claims of the creditors by the county court in the assignment proceedings and the sale and distribution of the assets of the corporation were equivalent to the entry of judgment in an action at law, and the issue and return of executions unsatisfied. The defendants contend that the county court had no jurisdiction because there was never any valid assignment.

Section 3505, Ann. St. requires every assignment for the benefit of creditors to be in writing, and that it shall be executed and acknowledged in the manner in which a conveyance of real estate is or shall be required to be executed and acknowledged in order to entitle the same to be recorded. In this state the law requires a deed of conveyance of real estate to be witnessed and acknowledged in order to be entitled to record. The deed of assignment was not witnessed. In *Sager v. Summers*, 49 Neb. 459, it was held that a deed of assignment, unless witnessed, is absolutely void. The deed of assignment was acknowledged before a notary public who was a stockholder of the corporation. Such an acknowledgment has been held invalid in *Horbach v. Tyrrell*, 48 Neb. 514; *Chadron L. & B. Ass'n v. O'Linn*, 2 Neb. (Unof.) 246. The first section of the act relating to the assignment for the benefit of creditors provides that no voluntary assignment for the

benefit of creditors hereafter made shall be valid unless the same shall be made in conformity to the terms of this act. It is clear that the deed of assignment was not made in conformity with the act relating to assignments for the benefit of creditors. In *Miller v. Waite*, 60 Neb. 431, it was held that the provisions of the assignment law requiring the filing of a deed of assignment for record within 24 hours after its execution is mandatory, and a failure to file such instrument within the time limited by statute avoids the assignment, and renders it of no force and effect. In *Heclan v. Hoagland*, 10 Neb. 511, it was held that an unacknowledged deed of assignment, although recorded, was void. In the dissenting opinion of Judge REESE in *Bonns v. Carter*, 22 Neb. 495, 515, which was afterwards held in *Kilpatrick-Koch Dry Goods Co. v. Bremers*, 44 Neb. 863, to be the law, it was held, in substance, that, where one undertakes to make an assignment under the statute, he must make it in accordance with it, otherwise it is no assignment, and is void. See, also, *Sloan v. Thomas Mfg. Co.*, 58 Neb. 713. It is clear that, under the statute and the rules announced in the authorities quoted from, the deed of assignment in the instant case was absolutely void.

It now becomes necessary to determine what force and effect shall be given to the assignment proceedings had in the county court which were based on the said assignment. Section 3538, Ann. St. 1907, confers full authority and jurisdiction upon the county courts to carry out the provisions of the assignment law. Section 3507 of the statute requires the assignor executing the deed of assignment to make and file within 10 days after such assignment, in the county judge's office, a verified inventory showing all the creditors of the assignor, the residence of each creditor, the sum owing to each creditor, the nature of each debt or liability, the consideration of the liability in each case, all of the property of the assignor at the date of the assignment, together with other detailed information. The following section makes it the duty of the county

judge, upon the filing of such inventory, to fix a date for the meeting of the creditors of the assignor, and to give notice of the time and place of such meeting. The subsequent sections contain provisions for the selection of an assignee and the administration of the assigned estate under the orders of the county court. Section 3516 requires the county judge to allow all claims filed that are uncontested, and upon all contested claims the county judge shall order pleadings to be filed, and contested claims shall be tried as in ordinary civil actions.

The plaintiffs contend that the filing of the inventory required by section 3507 vests the court with jurisdiction, and that a valid deed of assignment is not essential to give the county court jurisdiction. We are unable to assent to this view. The inventory is required to be filed only after the assignment has been made. Section 3508, making it the duty of the judge to take action, presupposes a valid deed of assignment. The object of the assignment law of this state is to permit a debtor to withdraw his property from the reach of his creditors and place it in custody of the law for ratable distribution among his creditors in the manner provided by the assignment law. It permits the debtor to impound his property, so that his creditors may not reach it by the ordinary process of law. The effect of a valid assignment is to place the property under the control of the county court. If the assignment is void, the right of the creditors of the assignor to reach his property by attachment, execution or garnishment is not taken from them. If the assignment is invalid, the property is not in the custody of the law, so as to withdraw it from the reach of creditors. Under a void assignment, the assignee acquires no title to the property conveyed by the assignment. The purpose of the law was to confer upon the county court jurisdiction to deal with the property of the assignor in the manner provided by the assignment law. If the assignment law is complied with, the result is that the county court has jurisdiction to deal with the assigned property and dis-

pose of it unhampered by the general creditors of the assignor. The intention of the law was to confer upon the county court jurisdiction to deal with assignments only when a valid assignment had been made, so that the court could deal with the assigned property in the manner contemplated by the assignment law. As the deed of assignment was void, the assignee took no title to the property, and he held it the same as an ordinary trustee would hold property for the assignor. It was subject to be levied upon by attachment or execution while in the hands of the assignee. After the property had been sold by the assignee, and before the funds had been distributed, they might have been reached in his hands by the process of garnishment. *Vernon v. Upson*, 60 Wis. 418; *Ogden Paint, Oil & Glass Co. v. Child*, 10 Utah, 475; *Heelan v. Hoagland*, 10 Neb. 511; *Ramsdell v. Sigerson*, 2 Gilm. (Ill.) 78; *Hardmann v. Bowen*, 39 N. Y. 196; Bishop, Insolvent Debtors (3d ed.), sec. 149; *Johnson v. Adams & Co.*, 92 Ga. 551; *Connor v. Omaha Nat. Bank*, 42 Neb. 602; *Bennett v. Knowles*, 66 Minn. 4.

We have been cited to the cases of *Farwell v. Crandall*, 120 Ill. 70, and *Farwell v. Cohen*, 138 Ill. 216. These cases hold that the jurisdiction of the county court in assignment proceedings does not depend upon the validity of the deed of assignment; that for the purpose of jurisdiction it is sufficient that there has been an assignment in fact for the benefit of creditors. An examination of the Illinois statute, however, shows that practically every attempt at an assignment should be construed as an assignment, while under our statute and the decisions of our court an assignment that does not comply with the statute with respect to being witnessed and acknowledged is absolutely void. The Illinois cases are therefore not in point. We are of the opinion that the county court was without jurisdiction, and that the assignment proceedings had there amounted to no more than would a sale and distribution of assets of the corporation by a trustee and the application of the proceeds to the claims of its

Stanton v. Driffkorn.

creditors. There was no judicial ascertainment of the claims of the plaintiffs, and there was no judicial exhaustion of the property of the corporation. Until these things occur, the plaintiffs are without right to maintain an action against the stockholders for their statutory liability.

It follows that the judgment of the district court should be reversed and the cause remanded for further proceedings according to law.

By the Court: For the reasons given in the foregoing opinion, the judgment of the district court is reversed and the cause remanded for further proceedings according to law.

REVERSED.

PATRICK STANTON ET AL., APPELLEES, V. ALBERTINE DRIFFKORN ET AL., APPELLANTS.

FILED DECEMBER 17, 1908. No. 15,263.

1. **Specific Performance: WHEN ENFORCED.** "Specific performance of an alleged contract will not be enforced unless the court can clearly see upon what proposition the minds of the parties have met in a common intention." *Krum v. Chamberlain*, 57 Neb. 220.
2. ———: ———. Specific performance will not be enforced unless the contract has been entered into with perfect fairness, and without misapprehension, misrepresentation, or oppression, unless it would be unjust and inequitable to refuse to enforce it. *Morgan v. Hardy*, 16 Neb. 427.
3. ———: **EVIDENCE.** Evidence examined and set out in the opinion, held insufficient to establish a claim for specific performance.

APPEAL from the district court for Madison county:
JOHN F. BOYD, JUDGE. *Reversed with directions.*

John C. Wharton and M. D. Tyler, for appellants.

M. F. Harrington and S. D. Robertson, contra.

FAWCETT, C.

On August 18, 1904, defendants executed and delivered to one F. A. Schmalle, a contract for the sale of the lands in controversy, and at the same time, and as a part of the same transaction, executed and delivered to Schmalle a bill of sale for certain articles of personal property. Subsequently, and prior to September 15, 1904, Schmalle assigned both the contract and bill of sale to plaintiffs. As a matter of fact, Schmalle had no interest in the transaction, but simply acted as a dummy for the plaintiffs, receiving a fee of \$10 for his services. The contract called for the payment of \$6,850, \$1,000 of which was paid at the time of its execution, and the remainder was to be paid on or before September 15, when defendants were to convey the land by fee simple title, furnish an abstract, etc. At the time the contract was entered into there was pending in the district court for Madison county a suit by one Mahala Jane Volgamore to recover a dower interest in one of the quarter sections of land in controversy here, which suit had been tried and submitted, but not yet decided. On September 15 defendants, knowing nothing of the assignments from Schmalle to plaintiffs, executed a warranty deed to the lands in controversy to Schmalle, and tendered it to the plaintiffs, who they had been led to believe were acting for Schmalle. They were then informed by the plaintiff Luikart that the plaintiffs had obtained an assignment of the contracts and a quitclaim deed from Schmalle. Defendants thereupon, on the same day, prepared a new deed to plaintiffs, and tendered it to plaintiffs and demanded the payment of the remainder of the purchase price. Plaintiffs refused to accept the deed, on the ground that the Volgamore suit was still pending against the land, and that defendants could not make a clear title, and further stated that they were ready to pay the remainder of the money whenever defendants could make them a clear title. The defendants stated that they had done all they could, and, if

plaintiffs were not willing to accept the deed, the deal would have to be called off, and defendants then offered to return to plaintiffs the \$1,000 which plaintiffs had paid at the time of the execution of the contract; which offer plaintiffs refused to accept. Nothing further was done by any of the parties until November 22, 1904. On that day plaintiffs commenced an action at law in the district court for Madison county against defendants, in which they set out the contract hereinbefore referred to, and alleged that defendants had refused to convey the lands in controversy, and prayed for a return of the \$1,000 which they had paid at the time of the making of the contract, for \$750 damages on account of the refusal of defendants to deliver the personal property, and \$3,550 damages caused by the refusal of the defendants to convey the land. The defendants appeared in that action, and filed a demurrer to the petition. On December 15, 1904, the district court for Madison county decided the Volgamore case adversely to plaintiff therein, and entered a decree quieting and confirming the title of the defendants (defendants in this suit). That suit was not appealed, and the decree became final. On January 28, 1905, in vacation, plaintiffs filed a written dismissal without prejudice of the action at law which they had commenced on November 22, 1904, and on the same day brought the present suit, in which they pray for the specific performance of the contract of August 18, 1904, and for an accounting.

For answer defendants allege: (1) That plaintiffs, with full knowledge of all the facts and circumstances of the transactions, on the 22d day of November, 1904, commenced an action at law in the district court for Madison county for a return of the \$1,000 which they had paid, and for other damages by reason of defendants' failure to convey, in the sum of \$4,300, making an aggregate of \$5,300; (2) that, in arranging the terms of the sale with Schmalle, defendants told Schmalle all about the Volgamore suit, and that, if they sold said farm to Schmalle, he must take the same subject to such suit, and that

Schmalle then and there stated to them that he knew all about the Volgamore suit, and was willing to purchase said land subject thereto; that, when the written contract for the sale was presented to defendants, defendants stated to the plaintiffs that there was to be no written contract, but that they were to make a deed for the land, and immediately receive their money; that plaintiffs thereupon stated that it was necessary to have a writing when real estate was sold, and that the contents of the purported contract were only the terms and agreement which they had made with Schmalle orally on the day previous; that defendants are not educated in the English language, and are unable to read the same readily, and that, owing to age and infirm eyesight, they could not see to read without glasses; that they thereupon requested plaintiffs to read such purported contract, so that they might be informed of its terms and conditions; that plaintiffs stated it was not necessary to read the contract, that there was nothing contained therein different from the contract already made and entered into between defendants and Schmalle; that defendants, relying upon said statements and representations of the plaintiffs, and believing the same to be true, and that they were selling the property subject to the said Volgamore suit and were to be paid in cash the whole amount of the purchase money above described, signed said contract; that the statements made by plaintiffs as to the contents of the contract were false and fraudulent, and that it was by reason of such false and fraudulent statements that defendants were induced to sign and execute said contract; that defendants have since learned that, while said Schmalle purported to be the purchaser of said property, he in fact was not purchasing the property, but was simply the instrument and tool used by plaintiffs to secure the execution of said contract; that thereafter plaintiffs demanded possession of the property upon the payment of \$1,000, stating that there would be some little delay about getting some necessary papers from Madison, and that when they received

those papers they would forward the rest of the money to defendants; that defendants refused to deliver possession of the land until the entire amount of the purchase money was paid; that subsequently they executed a good and sufficient deed of conveyance to Schmalle, and tendered the same to plaintiffs; that plaintiffs then stated that they had procured an assignment of said contract from Schmalle, and requested defendants to make a deed for said property to them; that defendants immediately executed a deed running to the plaintiffs, and tendered the same, and demanded the immediate payment of the remainder of the purchase money; that plaintiffs refused to accept the deed or to pay the purchase money, giving as a reason that the Volgamore suit was still pending and undetermined; that immediately upon learning that said purported written contract contained other and different conditions than those contained in the oral contract between them and said Schmalle, defendants offered to return the said sum of \$1,000 which had been paid as part of the purchase money, but the plaintiffs refused to receive the same; that immediately thereafter they left the said money in the Elkhorn Valley Bank at Tilden, instructing the officers of said bank to return the same to said Schmalle or the plaintiffs upon their request, and that said money has ever since remained in said bank, subject to the order of the said Schmalle or the plaintiffs; that defendants "now bring said money into court and tender the return of the same"; that since the time of the tender of the deed to said property the Volgamore suit has been finally adjudicated and determined in favor of defendants; that, by reason of the failure of plaintiffs to accept the deed tendered to them in accordance with the terms of their contract with Schmalle, defendants have been subjected to great inconvenience and expense, and have been prevented from consummating their plans, whereby all the members of their family could be united in their home at Omaha; that said written contract was never made and entered into by them with a knowledge of

its contents, but that their signature thereto was obtained by fraud, deceit and misrepresentation on the part of plaintiffs, and that the terms contained in said purported contract were never agreed to by the defendants nor acquiesced in; that the minds of the parties to said purported contract never met, and that said document is not binding upon defendants, and pray the court to find that the said alleged written contract was procured by fraud and deceit, and to adjudge that the same is void and of no force and effect, and that the bill of sale of the personal property executed by defendants to Schmale be also found to have been procured by fraud, misrepresentation and deceit, and that the same is null and void, and that it be adjudged to be canceled and annulled; that plaintiffs' action be dismissed, and that defendants have and recover their costs herein expended, and for general and equitable relief.

For reply plaintiffs aver that at the time said action was commenced the Volgamore suit was pending, and that before the commencement of this action the said Volgamore suit was determined and adjudicated in favor of defendants, and thereupon said action for damages was dismissed by plaintiffs without prejudice, and this action commenced; that at the time this action was commenced defendants were able to comply with the terms of the contract, and deny all of the other allegations of plaintiffs' petition. Subsequently a supplemental petition and an answer thereto were filed; but, in the light of the disposition which must be made of the case, it is unnecessary to refer to them.

The district court found in favor of plaintiffs and against the defendants, and that the \$1,000 of the agreed purchase price of \$6,850 had been paid; that there still remained unpaid \$5,850; that the value of the personal property referred to in the contract was \$730, and the defendants had wrongfully converted the same to their own use; that said sum of \$730, the value of the personal property, should be deducted from said \$5,850, leaving a

remainder due from defendants to plaintiffs of \$5,120; that plaintiffs had brought into court the full remainder of the purchase money, \$5,850, and tendered the same to the defendants, and that plaintiffs stand ready and willing to pay and are prepared to pay said money; that said money so tendered by plaintiffs was not left with the clerk of the court nor deposited with him, but was retained by the plaintiffs, and has at all times been and still is retained by the plaintiffs, and that the value of the use of said money in the hands of the plaintiffs is equal to and offsets the value of the rents and profits of said lands; and decreed that within 20 days from the date thereof, upon plaintiffs paying to the defendants or to the clerk of the court, the remainder of the purchase price as found by the decree, the defendants should convey to the plaintiffs by good and sufficient deed the real estate in controversy. From that portion of the decree awarding specific performance, defendants appeal; and, from that part of the decree which adjudged that the value of the use of the money in the hands of the plaintiffs was equal to and offset the value of the rents and profits, plaintiffs prosecute a cross-appeal.

The evidence shows that Schmalle was a minister of the gospel; that, when he first called upon defendants to try and purchase their farm, he told them that he was tired of preaching, and wanted to go on a farm; that defendants first asked \$10,000 for the farm, which amount Schmalle stated was entirely too much, that there were present at that interview Schmalle, Mr. and Mrs. Driffkorn, defendants, and their son; that Mrs. Driffkorn, in whom the title to the land stood, stated to Schmalle that she could not sell the farm because there was a suit against the land by Mrs. Volgamore for a dower; that Schmalle said he knew all about that suit, and that he would take the land subject to it, and for that reason he should have it at a less price. They failed to come together on the terms, and separated. The next day Schmalle and plaintiff Luikart again went to the farm,

at which time Schmalle had another interview with Mrs. Driffkorn, and again failed to come to terms. After Schmalle and Mr. Luikart left, Mrs. Driffkorn and her husband talked matters over; the husband urging that she consent to the sale, so that he could return to Omaha and the family all be together again. It seems that prior to this time Mrs. Driffkorn and some of the children had been living in Omaha, while Mr. Driffkorn was living upon the farm, and one of their main reasons for desiring to sell appears to have been that the family might all be together again at their Omaha home. As a result of that conversation, Mrs. Driffkorn finally yielded, and that evening Mr. Driffkorn went to Tilden, and told Schmalle that his wife had decided to sell. Thereupon the parties repaired to the bank of plaintiff Luikart, where the contract and bill of sale were drawn up, and signed by Mr. Driffkorn with the understanding that Mrs. Driffkorn would sign the next day, and on the next day Schmalle and Luikart appeared at the farm with the contract for the purpose of obtaining Mrs. Driffkorn's signature thereto. The evidence as to what transpired at that time is quite conflicting, the testimony in behalf of defendants showing that Mrs. Driffkorn objected to signing any paper, stating that there was not to be any written contract, but that they were to pay her the money in cash and receive their deed. She also testified that she had left her glasses in Omaha, and was unable to read, and requested them to read the contract to her, so that she might know what it contained; that plaintiff informed her that it was not necessary to read the contract, as it contained simply the terms she had talked over with Schmalle the day before; that, in reliance upon their assurance that there was nothing in the contract different from what she had talked with Schmalle, she signed the paper and received the \$1,000 advance payment. Within a day or two after this plaintiffs endeavored to gain possession of the land, but to this Mrs. Driffkorn objected, stating that they could not have possession until they paid her the remainder of

Stanton v. Driffkorn.

the purchase money, and defendants continued to retain possession.

The question as to whether or not plaintiffs were justified in refusing to receive the deed tendered September 15 and pay the remainder of the purchase money, in our judgment, turns upon the question as to whether or not they purchased the land from Mrs. Driffkorn with full knowledge of the Volgamore suit, and subject thereto. Mr. Luikart testified that he never heard of the Volgamore suit until after the contract had been signed and he had ordered an abstract of the land. Plaintiff Stanton, however, admitted that he had heard of the Volgamore suit, but supposed that it had been settled. If he had heard of the Volgamore suit before the contract was entered into—a suit which involved a substantial interest in the lands he was purchasing—and then, on the strength of a mere rumor that that suit had been settled, joined with Mr. Luikart in paying a substantial sum of money as an advance payment on the purchase of such land, he certainly acted very differently from what prudent men ordinarily act under such circumstances. However that may be, it seems to us that it is unnecessary to consider what knowledge either Mr. Luikart or Mr. Stanton may have had of the Volgamore suit, if their agent, Schmalle, whom they had sent to make the purchase, was fully advised of that suit at the time he was conducting his negotiations with Mrs. Driffkorn, and agreed to purchase the farm subject thereto. On this branch of the case there is a conflict in the testimony. Schmalle says that no such statements were made or agreement had. Mrs. Driffkorn and her husband and their son all three testified unqualifiedly that Mrs. Driffkorn spoke about the Volgamore suit; that Schmalle said he knew all about it; and the testimony of at least one of these witnesses shows that he used the Volgamore suit as an argument for beating down the price. In the face of this testimony as applied to the law which we have laid down on the subject, we think the district court erred in granting plaintiffs specific perform-

ance. In *Krum v. Chamberlain*, 57 Neb. 220, we said: "Specific performance of an alleged contract will not be enforced unless the court can clearly see upon what proposition the minds of the parties have met in a common intention." It certainly cannot be contended under this evidence that the minds of the parties ever met in a common intention that plaintiffs were not to pay the remainder of the purchase money until defendants had relieved the land of the claim asserted in the *Volgamore* suit.

It is also well settled in this court that courts of equity will not always enforce a specific performance of a contract. In *Morgan v. Hardy*, 16 Neb. 427, we said: "Such applications are addressed to the sound legal discretion of the court, and the court will be governed, to a great extent, by the facts and merits of each case, as it is presented. * * * Specific performance will not be enforced unless the contract has been entered into with perfect fairness, and without misapprehension, misrepresentation, or oppression," And in *Clarke v. Koenig*, 36 Neb. 572, we said: "Specific performance is not generally a legal right, but rests in the sound, legal, judicial discretion of the trial court. * * * A party invoking the equity powers of a court to enforce specific performance of a contract, which he claims is for the sale to him of real estate, must exhibit a contract unambiguous and certain." In *Kofka v. Rosicky*, 41 Neb. 328, we said: "Specific performance is a matter of discretion in a court which withholds or grants relief according to the circumstances of each particular case, where the general rules and principles governing the court do not furnish any exact measure of justice between the parties." As early as *Morgan v. Bergen*, 3 Neb. 209, we said: "In an action or specific performance, the contract sought to be enforced must be clearly established, and the acts of performance must unequivocally appear to relate to the identical contract upon which the action is brought." The above holdings of this court are eminently sound, and should be strictly adhered to. In the light of the law as

it is thus announced, can it be said that the plaintiffs, in obtaining the execution of the contract which they are seeking to enforce, acted with perfect fairness, and that defendants entered into the contract as made, without misapprehension or misrepresentation? We think not. A reading of the entire record impresses us that, all through the transactions referred to, defendants were acting openly and in good faith; that they were willing to sell their lands to the plaintiffs for \$6,850, subject to the Volgamore suit; and also impresses us that the plaintiffs did not act openly and fairly and in good faith. We do not know what their purpose was in sending Mr. Schmale to represent them in the attempted purchase of the land, nor why plaintiff Luikart so zealously concealed his connection with the transaction, even to the extent of acting as notary public in taking the acknowledgment of the Driffkorns to the contract, an act on his part which, in our judgment, rendered the acknowledgment absolutely void. We think that the evidence in this case falls far short of establishing a contract entered into with perfect fairness, and without misapprehension or misrepresentation.

There is another reason why we think the court in the exercise of its discretion should have denied specific performance in this case. When the defendants tendered the deed on September 15, and it was refused by plaintiffs, defendants immediately offered to return the \$1,000 which had been paid. This plaintiffs refused, stating that they were ready to pay the remainder of the purchase price whenever defendants could give them a clear deed. If they had stood upon that ground, they would have occupied a more equitable position before the court, but they did not do so. On the contrary, on November 22 they commenced their action at law, hereinbefore referred to, in which they sought to recover back the \$1,000, and damages for the failure of defendants to convey. Having commenced that action, we think defendants had a right to assume that plaintiffs no longer intended to insist upon

a performance of the terms of the written contract by defendants, and that defendants then had a right to make such disposition of the personal property set out in the bill of sale as they might deem proper. This defendants proceeded to do, and thereby materially changed their situation to their disadvantage if plaintiffs should subsequently attempt to specifically enforce the contract. Plaintiffs persisted in their law action until the Volga-more suit was decided in favor of the defendants. They then sought to change their ground by dismissing the action at law and commencing the present suit. We do not think a court of equity in the exercise of its sound discretion should sanction such a course. A party to a controversy should not "blow hot and blow cold." The defendants were entitled to know what course plaintiffs were going to take, and, having elected to proceed at law, they should not be permitted to subsequently abandon that proceeding and proceed in equity, simply because it then appeared that that would be more advantageous to them; this, too, regardless of the fact as to whether or not plaintiffs had two distinct remedies, the one inconsistent with the other.

Without pursuing the matter further, we think that the judgment of the district court should be reversed and the cause remanded, with instructions to the district court to dismiss plaintiffs' suit at plaintiffs' cost, upon the defendants paying into court the sum of \$1,000 for plaintiffs' use, within a reasonable time to be fixed by the court, and we so recommend.

CALKINS, C., concurs.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded, with instructions to the district court to dismiss plaintiffs' suit at plaintiffs' cost, upon the defendants paying into court the sum of \$1,000 for plaintiffs' use, within a reasonable time to be fixed by the court.

JUDGMENT ACCORDINGLY.

CHARLES S. JOHNSON, APPELLEE, V. BANKERS UNION OF
THE WORLD, APPELLANT.

FILED DECEMBER 17, 1908. No. 15,356.

1. **Insurance: BENEFICIAL ASSOCIATIONS: CHANGE IN LAWS.** Where a fraternal benefit association has not complied with the provisions of section 1, ch. 47, laws 1897, and adopted a representative form of government, its governing body is without power to adopt a constitution or by-law, or to amend the same, changing the terms and obligations of a mutual benefit certificate theretofore issued to one of its members.
2. ———: **BENEFIT CERTIFICATES: DEDUCTIONS.** Where the constitution and by-laws of a beneficial society provide that on the death of a member the amount due on his certificate shall be ascertained by deducting from its face value the monthly assessments from the death of the member to the expiration of the life expectancy of such member at time of entry, with 4 per cent. interest thereon, and the constitution and by-laws are afterwards changed, increasing the monthly assessments to be collected, but such increased assessments are not demanded or collected from old members, but only from persons thereafter joining, and the old members continue to pay at the old rate until the death of a certificate holder, *held*, that the society, in settling with the beneficiaries of the deceased member, cannot decrease the amount of the recovery, but is entitled to deduct the difference between the rate of the monthly assessment in force when the certificate was issued and the increased rate provided by the amendment computed from the time when the new rate went into effect up to the date of the death of the member, and not for the remainder of the life expectancy of such deceased member.

APPEAL from the district court for Cass county: PAUL JESSEN, JUDGE. *Affirmed.*

Matthew Gering, for appellant.

D. O. Dwyer, contra.

FAWCETT, J.

In October, 1901, defendant issued to plaintiff, Charles S. Johnson, and his wife, Clara B. Johnson, a joint policy of insurance, payable upon the death of either to the

survivor. On February 19, 1904, while the policy was still in full force and effect, Clara B. Johnson died, leaving plaintiff as her surviving husband and beneficiary. This action is brought to recover the amount due under said policy. The face value of the policy was \$1,000. At the time of the issuance of the policy the constitution and by-laws of the defendant provided: "For the purpose of creating a reserve fund, to guard against poor risks, protect healthy members, equalize the cost to all, and absolutely insure the perpetuity of the union, all insurance of the Bankers Union of the World will be adjusted and paid on the following plan: Should any member holding a policy die before having lived out his expectancy of life, based on his age at entry according to the American Experience Table of Mortality, there shall be deducted from the death benefit payable under such policy held by said member, a sum equal to the amount of payment (at the rate paid by the member), for each month of the unexpired period of such life expectancy, with 4 per cent. on the unpaid balance of such sum." The rate of premium or assessment of Mrs. Johnson under the by-laws in force at the time the policy was issued was 81 cents a month, the joint rate of herself and husband being \$1.24 a month. Her life expectancy according to the American Experience Table of Mortality at the time the policy was issued for her then age of 38 years was 29.6 years, of which 27.23 were remaining at the time of her death. It will be seen from this that, if plaintiff's recovery in this case is based upon the law in force at the time the policy was issued, it should be for the sum of \$1,000, less 81 cents a month for 27.23 years, with 4 per cent. interest.

Subsequent to the issuance of the policy, in May, 1902, defendant attempted to amend its constitution and by-laws concerning joint policies so as to provide: "The amount of such policy to be paid to the survivor of such parties based upon the joint rate provided herein for the life expectancy of the deceased member." Defendant also

increased the monthly joint rate assessment of the plaintiff and his wife from \$1.24 to \$2.24 a month, but during the nearly two years which elapsed from the time of such attempted change until the death of Mrs. Johnson never demanded said increased rate, and the same never was paid; plaintiff and his wife continuing to pay the joint rate of \$1.24 a month during all of that time just as they had done prior to the attempted change. At the same time defendants lowered the rate of interest upon the unpaid balance from 4 per cent. to $2\frac{1}{2}$ per cent. Under this attempted change in the constitution and by-laws, it will be seen that plaintiff's recovery, if he is bound thereby, would be the sum of \$1,000, less a monthly assessment of \$2.24 for 27.23 years, with $2\frac{1}{2}$ per cent. interest. By the former computation he would be entitled to receive upon the death of his wife \$733.19, while under the latter computation he would be entitled to receive only \$183.23. The defendant in its brief says: "The only controversy arises in the case as to which constitution governs in computing the amount due. Under the constitution in force at the time of the issuance of the policy, there would be due appellee the sum of \$733.19. Under the constitution of 1901, as amended in May, 1902, computing at the increased rate, there would be due the sum of \$183.23." This is a fair and frank admission of the only real controversy in the case. The law applicable to this question has been so definitely settled by the former adjudications of this court that we do not need to consider the many authorities cited from other courts. The case was tried to the court below without a jury. The court found that plaintiff was entitled to recover under the law in force at the time the policy was issued, and, following *Shepperd v. Bankers Union of the World*, 77 Neb. 85, entered judgment against the defendant for \$866.14, being \$1,000, less 81 cents a month for 27.23 years, and the difference between the monthly assessments of \$1.24 and \$2.24 a month from the date of the attempted change of the by-laws in May, 1902, to the death of Mrs. Johnson in February, 1904, with 4

per cent. on the unpaid balance. There are two reasons why the judgment of the district court was right and must be affirmed:

1. In *State v. Bankers Union of the World*, 71 Neb. 622, we held that prior thereto this defendant had failed to comply with the provisions of the statute governing such organizations by not having established and maintained a representative form of government, which required that the directors and other officers having general charge and control of the property and business of the society and the management of its affairs should be chosen by the membership thereof; and because of this failure of the defendant to comply with such statute we enjoined it from doing business until such error should be corrected; and in *Lange v. Royal Highlanders*, 75 Neb. 196, we held: "Where a fraternal benefit association has not complied with the provisions of section 1, ch. 47, of the act of 1897, and adopted a representative form of government, its governing body is without power to adopt an edict or by-law changing the terms and obligations of a mutual benefit certificate theretofore issued to one of its members." Under the law as thus announced by this court, it is clear that the defendant in May, 1902, was without power or authority to amend its constitution and by-laws so as to affect the rights of any policies then in force.

2. In *Shepperd v. Bankers Union of the World*, *supra*, we had under consideration the identical question here presented. In that case we held: "The constitution and by-laws of a beneficial society provided that on the death of a member the amount due on his certificate should be ascertained by deducting from its face value the monthly assessments from the death of the member to the expiration of the life expectancy of such member, with 4 per cent. interest thereon. The constitution and by-laws were afterwards changed, increasing the monthly assessments to be collected, but providing that such increased assessments should be collected only from members thereafter joining, the old members to continue to pay at the old

rate and on their death the increase over the old rate to be deducted from their certificate. *Held*, That the society had the right, in settling with the beneficiaries of a deceased member, to deduct from the certificate the difference between the rate of the monthly assessments in force when the certificate was issued and the increased rate provided by the amendment computed from the time when the new rate went into effect up to the date of the death of the member, but not for the remainder of the life expectancy of such deceased member."

We are now asked to overrule, or at least to distinguish, the above case, but we are unconvinced by the able brief submitted by counsel for defendant. In the opinion in the *Shepperd* case, Mr. Commissioner DUFFIE exhaustively reviews the authorities, and very forcefully and, as we still think, correctly supports his reasoning and sustains the conclusion therein reached. In deciding the present case, the learned district court very properly followed the rule laid down in the *Shepperd* case. These questions having been so fully considered by us in *State v. Bankers Union of the World*, *Lange v. Royal Highlanders*, and *Shepperd v. Bankers Union of the World*, *supra*, we deem further discussion unnecessary.

Defendant's last contention is that there is error in the amount of plaintiff's recovery in that the court allowed interest upon the amount found due plaintiff from May 19, 1904, to the first day of the term of court at which the judgment was entered, basing its contention upon the clause in the policy which provides that it shall be payable "within 90 days after receipt and approval of said proof of death." Defendant is not entitled to have this assignment considered, for the reason that that matter was not called to the attention of the trial court in the motion for new trial. Not having been raised in the court below, it cannot be considered here; but, even if it were to be considered, we think defendant's contention would have to fail. Mrs. Johnson died February 19, 1904. In the petition plaintiff alleges that soon thereafter proof

Herpolsheimer v. Acme Harvester Co.

of death was made and furnished defendant. In its answer defendant admits "that proof of death was duly furnished." It is not disclosed either by the pleadings or the evidence when it was furnished. Under plaintiff's allegation and defendant's admission, we think plaintiff is entitled to the presumption that the proof was furnished at once. If this is not so, that fact could easily have been shown by defendant. If furnished at once, then the district court was clearly right in allowing interest from 90 days thereafter.

Finding no error in the record, the judgment of the district court is

AFFIRMED.

MARTIN HERPOLSHEIMER ET AL., APPELLEES, V. ACME HARVESTER COMPANY, APPELLANT.

FILED DECEMBER 17, 1908. No. 15,404.

1. **Appearance.** Plaintiff obtained service on defendant by an affidavit in attachment and service on V. B. as garnishee. Defendant appeared specially and challenged the jurisdiction of the court. The special appearance was overruled. Defendant, not waiving, but still relying and insisting upon, its objections to the jurisdiction, answered to the merits. The trial resulted in judgment for plaintiff and an order on the garnishee to pay the money into court. Defendant appealed and filed a supersedeas bond, whereupon the parties entered into a stipulation and procured the entry of an order discharging the garnishee. *Held*, A general appearance by defendant.
2. **Judgment: RES JUDICATA.** The doctrine of *res judicata* is that a question once determined by a judgment on the merits is forever settled, so far as the litigants and those in privity with them are concerned, but, where issue has not been joined nor any trial had on the merits, the doctrine of *res judicata* does not apply.
3. **Principal and Agent: AUTHORITY OF AGENT.** An agent for the sale of farm machinery and twine, who is clothed by his principal with power "to make contracts and settlements and collect balances, and the like," has full power to bind his principal by an agreement to relieve a customer to whom he has sold an amount of twine largely in excess of the demands of trade of such cus-

Herpolsheimer v. Acme Harvester Co.

tomor by directing such customer to ship such excess to other parties named by said agent.

4. **Trial: INSTRUCTIONS.** Although an instruction given to the jury may be somewhat broader than the pleadings, it is not error to give it, if it be in harmony with the theory upon which both parties have tried the case.
5. **Sales: EVIDENCE.** Evidence examined and set out in the opinion held sufficient to sustain the verdict of the jury.

APPEAL from the district court for Lancaster county:
ALBERT J. CORNISH, JUDGE. *Affirmed.*

E. M. Bartlett and Billingsley & Green, for appellant.

Field, Ricketts & Ricketts, contra.

FAWCETT, J.

This action was brought in the district court for Lancaster county to recover a balance due for 6,000 pounds of twine. Plaintiffs are residents of Nebraska, and defendant an Illinois corporation. Service was obtained by an affidavit in attachment and service upon one A. E. Van-Burg, a resident and citizen of Lancaster county, as garnishee. Defendant appeared specially and challenged the jurisdiction of the court upon the ground that the indebtedness due from the garnishee to defendant was payable at Peoria, in the state of Illinois. The objections to the jurisdiction were overruled, whereupon defendant filed its answer, in the first paragraph of which it again raised the question of jurisdiction. In the second paragraph defendant alleges that prior to the commencement of this action plaintiffs had filed a petition in the county court of Lancaster county, substantially in the same words and figures of the petition filed in this case, filed their affidavit for service by publication, substantially in the words and figures in the affidavit for publication in this case, and an affidavit in attachment and garnishment, substantially the same as in this case; "that issues were joined in said court between plaintiffs and the defendant,

to the end that the same matters at issue in this case were litigated in said county court of Lancaster county, Nebraska, and said court entered judgment determining the same, dismissing the cause of action of plaintiffs, and further holding that the court was without jurisdiction in the premises; that said judgment was duly entered by a court of competent jurisdiction in an action between these plaintiffs and this defendant, in which the subject matter at issue was identical with the subject matter at issue in this case, and that said judgment constitutes and is an adjudication of the matters sought to be put in issue herein; and that, although the plaintiffs herein prosecuted error proceedings from said judgment, and took an appeal from such judgment, both said error proceedings and said appeal have been dismissed by this court, and the judgments of this court in both of said cases dismissing said error proceedings and said appeal are in full force and effect, unappealed from, as is also the judgment of the county court of Lancaster county, Nebraska, as hereinbefore pleaded, of full force and effect." The third paragraph of the answer is prefaced as follows: "For further answer, the defendant, in no manner waiving, but at all times relying and insisting upon, its objections to the jurisdiction herein, says," and then specifically denies a number of allegations in plaintiffs' petition. The fourth paragraph is prefaced as above, and alleges a compromise settlement and adjustment of all matters between plaintiffs and defendant. The fifth paragraph is prefaced as above, and then denies each and every allegation in plaintiffs' petition not specifically admitted. The answer ends with this prayer: "Wherefore, having fully answered, defendant prays judgment against plaintiffs for costs." The reply, as it stood at the time of the trial, is a general denial. There was a trial to the court and a jury, which resulted in a verdict for plaintiffs, upon which judgment was duly entered, together with an order upon the garnishee to pay the money in his hands into court. Subsequently defendant filed a supersedeas bond to stay the ex-

Herpolsheimer v. Acme Harvester Co.

ecution of said judgment pending the present appeal. After the giving of the supersedeas bond the following stipulation was entered into between the parties: "It is hereby stipulated that this cause having been appealed to the supreme court, and a supersedeas bond having been given, an order may be granted discharging the garnishee in this case." Whereupon the court made the following order: "On reading and filing stipulation herein, and this cause having been appealed to the supreme court by the defendant, and it appearing to this court that a supersedeas bond has been filed herein in the supreme court, and the parties having filed a stipulation by reason of such supersedeas bond, that the garnishee herein, A. E. Van Burg, be discharged. It is therefore ordered that the said garnishee A. E. Van Burg be, and he is, hereby discharged and entirely freed from said garnishment proceedings."

The defenses of want of jurisdiction and *res judicata* are again insisted upon in this court. The defense of want of jurisdiction must fail. The stipulation for the discharge of the garnishee, although made after judgment in the district court, clearly constituted a general appearance in the action. "A defendant may appear specially to object to the jurisdiction of the court, but if, by motion or other form of application to the court, he seeks to bring its powers into action, except on the question of jurisdiction, he will be deemed to have appeared generally." *McKillip v. Harvey*, 80 Neb. 264. This has been the rule in this court ever since *Cropsey v. Wiggenhorn*, 3 Neb. 108. The record shows that in the action brought in the county court issue was never joined nor any trial had on the merits. The county court sustained defendant's special appearance, and dismissed the action for want of jurisdiction. Plaintiffs appealed, and also prosecuted proceedings in error to the district court from that judgment of dismissal; but in the district court, as stated by counsel for defendant in their brief, said proceedings were dismissed by attorneys for plaintiffs. In

the face of this record, it is very clear that the defense of *res judicata* must also fail. Where issue has not been joined nor any trial had on the merits, the doctrine of *res judicata* does not apply. The rule is well stated by SULLIVAN, C. J., in *State v. Savage*, 64 Neb. 684: "The doctrine of *res judicata* is that a question once determined by a judgment on the merits is forever settled, so far as the litigants and those in privity with them are concerned." In Wells, *Res Adjudicata*, sec. 13, it is said: "It is an essential requisite of a conclusive judgment that it should go to the merits of the controversy in hand, and hence must not be based merely upon technical defects in the pleadings. Otherwise, as a general rule, it will not bar a subsequent action upon the same subject matter by the same parties. For example, if the foundation of a suit is the right of property, and the matter actually adjudicated relates only to a particular form of remedy, it is evident that the real question of the right of property is still *res integra*, not being adjudicated. The merits are not involved, for if a certain form of action be improper, there may be another one wholly unobjectionable." The same author (sec. 440) says: "Where a refusal to award a mandamus does not include an adjudication on the merits of a question of title, the refusal cannot conclude the question of title, or if the failure is because the court has no jurisdiction, nothing is conclusive, even if the evidence is heard." In *Waddle v. Ishe*, 12 Ala. 308, it is held: "Where evidence is heard by a justice of the peace upon the merits in a suit before him for a trespass, but the cause is eventually dismissed by him for want of jurisdiction, this not being a decision upon the merits, is no bar to a subsequent suit for the same cause of action."

While plaintiffs in their petition based their claim for recovery upon a number of different items, when the case came on for trial, they abandoned all of those items except their claim for 6,000 pounds of twine, and the case was tried upon that claim only. The evidence shows substantially that in the spring of 1904 plaintiffs, who were

Herpolsheimer v. Acme Harvester Co.

then engaged in the agricultural implement business in the city of Hastings, placed an order with one W. A. Howard, a representative of defendant, for 20,000 pounds of twine. Shortly after giving the order plaintiffs attempted to countermand the same to the extent of one-half thereof, but, the twine having been already shipped, they were advised by defendant's general agent at Omaha that it was too late to countermand. This letter was dated June 23, 1904. On the next day Mr. Howard wrote plaintiffs from Osceola, Nebraska, as follows: "In regard to twine we will ship extra 10,000 pounds elsewhere. Yours truly, W. A. Howard." The letterhead bears the card: "W. A. Howard, Traveler Acme Harvester Co., Phone 67." Mr. Rudolph Herpolsheimer, who was in charge of plaintiffs' business at Hastings, testified that at the time he gave the order for the 20,000 pounds of twine he supposed they were ordering it from the defendant; that they were local agents for defendant, and knew Mr. Howard as the representative of defendant in that district; and that, while he signed a written order for the twine, he did not read it. When they received the twine, they received it from Hooven & Allison Company, Xenia, Ohio. It appears that Hooven & Allison Company is a manufacturer of twine, and that defendant was their agent and distributor for the state of Nebraska. Subsequent to Mr. Howard's letter of June 24, stating that "we will ship extra 10,000 pounds of twine elsewhere," one O. P. Olson, who was the general agent of defendant in Nebraska, and, as appears from the evidence, had practically exclusive charge of defendant's business in this state, wrote plaintiffs the following letter: "Omaha, Neb., July 5, 1904. Herpolsheimer Implement Co., Hastings, Neb. Gentlemen: Saturday we asked you to ship twenty-five hundred pounds of twine to Trager & Stromquist, Bertrand, Neb., fifteen hundred pounds to John Atwood, Moorefield, Neb. We asked you to collect no advance freight. This was an error. If you have not already shipped the twine, collect \$6.25 on the twenty-five hun-

dred pounds you shipped to Bertrand, and \$3.75 on the fifteen hundred pounds you shipped to Moorefield. This is the amount of freight you have in the twine. Yours truly, Acme Harvester Company, by O. P. Olson, General Agent."

Prior to the writing of this letter, some time in June, 1904, plaintiffs were directed by Mr. Howard to ship 6,000 pounds of twine to Guick & Paulson at Trumbull, Nebraska, and to collect \$25 or \$26 advance freight charges. Plaintiffs complied with the request, and shipped the 6,000 pounds as directed. They also complied with the directions of Mr. Olson contained in his letter of July 5, and shipped 2,500 pounds to Trager & Stromquist, Bertrand, Nebraska, and 1,500 pounds to John Atwood, Moorefield, Nebraska. It will be seen that these amounts aggregate the quantity which Mr. Howard had stated they would ship elsewhere. Plaintiffs sold 2,000 of the remaining 10,000 pounds, and the remaining 8,000 pounds were destroyed by fire. For some reason not disclosed, the insurance companies declined to pay plaintiffs' loss, and suit was brought against the companies by Ricketts & Ricketts, as attorneys for plaintiffs. Plaintiffs subsequently made a settlement of their account with Hooven & Allison Company by giving them an order upon Ricketts & Ricketts to be paid when plaintiffs realized upon their insurance. Some point is attempted to be made by defendant on the fact that plaintiffs had not paid Hooven & Allison Company any money; but we think that is immaterial, as their adjustment of that matter seems to have been entirely satisfactory to Hooven & Allison Company. At any rate, they are not here objecting. Hooven & Allison Company collected for the 2,500 pounds from Trager & Stromquist, and for the 1,500 pounds from Atwood, but declined to recognize the transfer of the 6,000 pounds to Guick & Paulson. Mr. Herpolsheimer testifies that he shipped the 6,000 pounds of twine to Guick & Paulson on the order of Mr. Howard; that plaintiffs never opened any account with Guick & Paulson, and never had any deal-

ings or communication with them in relation to the twine; the effect of his testimony being that the plaintiffs considered the matter from that time forward as a matter purely between defendant and Guick & Paulson, and in this he is corroborated by the testimony of Mr. Guick. Mr. Howard testified that he was not acting for the defendant in that matter; that plaintiffs had stated to him that they were going to be "long on twine," and that he, learning that Guick & Paulson wanted to buy some 5,000 or 6,000 pounds, told plaintiffs that they could sell their twine to them; that he never knew until shortly before the trial that plaintiffs were claiming that their transfer of 6,000 pounds of twine to Guick & Paulson was in effect a sale thereof to defendant. Later on, and in the fall of that year, Mr. Howard collected \$165 from Guick & Paulson on the twine account, but he says he made such collection at the request of plaintiffs. This Mr. Herpolsheimer denies. He testified that Howard and Mr. Olson came to him and wanted him to give them an order on Guick & Paulson for the money due on the twine; that he refused to do so, informing them that it was not his account, but theirs. Howard denies this, and testified that Mr. Herpolsheimer told him that he had been over to Guick & Paulson's to try to collect for the twine, and had been unable to do so. This Mr. Herpolsheimer denies positively, stating that he never went to see Guick & Paulson about it; and he is corroborated by Mr. Guick, who testified that they never had any dealings whatever or any communications with plaintiffs in relation to the twine. For some reason Mr. Olson, the general agent, was not called by defendant to corroborate Mr. Howard in this matter.

Both parties on the trial of the case seem to have treated the transaction in relation to the shipment of the 6,000 pounds of twine by plaintiffs to Guick & Paulson as a sale; and it is urged by defendant that Mr. Howard had no authority whatever to purchase twine for the defendant. We do not think the transaction was in the

strict sense of the term a sale. It was more in the nature of a taking back by defendant from plaintiffs of part of the twine which it had sold to them. They had sold plaintiffs 20,000 pounds of twine. It became apparent that by this sale it had overstocked its local agents, and so, in accordance with the letter of Mr. Howard to the plaintiffs, it directed the shipment of the extra 10,000 elsewhere, so that, to the extent of that 10,000 pounds, it treated plaintiffs as distributors, and, when it ordered the 10,000 pounds distributed by shipment to the three parties above named, it thereby canceled plaintiffs' order to the extent of the quantity so transferred, and we think was thereafter bound to look to the parties to whom it ordered it transferred, and not to plaintiffs. As to such matters we think Mr. Howard had full authority to represent the defendant. Defendant called Mr. Howard to the witness stand, and we have the following as a part of his direct examination: "Q. What is your business? A. I held a block out there for the Acme Harvester Company in 1904. Since that time I have been with the Acme Harvesting Machine Company in the same position. Q. As their agent? A. Yes, sir. Q. What are your duties as agent and blockman, and what were they in 1904 for the Acme Harvester Company? A. To make contracts and make settlements and collect balances, and such like as that. Q. Now, what did that territory embrace—how much of the state of Nebraska? A. Oh, from York county straight across to the Platte river, and all west on the south side of the Platte river; that would be 30 odd counties, or more." This testimony was offered by defendant itself, and to our minds it clearly shows that Mr. Howard had full authority, if he found he had made a contract with plaintiffs for more twine than they could handle, to agree with them that he would have any portion of such twine shipped to other points, and thereby relieve plaintiffs of their excessive order, and that such action on his part would bind the defendant. Whether

he in fact did so or not is a disputed fact in the case, and was for the jury.

Mr. Howard testified that the money which he collected from Guick & Paulson was credited to the plaintiffs upon their account for machinery which defendant had sold plaintiffs. We think that fact is immaterial, as plaintiffs are not now seeking to recover from defendant the amount so collected, but have accepted the credit so given by defendant, and are simply seeking to recover the remainder due for the 6,000 pounds delivered to Guick & Paulson. The question of ratification is discussed at some length in the brief, but, in the light of our holding that Howard had authority to represent defendant in the matters complained of, it is unnecessary to consider that question.

Complaint is made of certain instructions given by the court, particular objection being taken to instruction No. 2, or rather to that portion thereof which reads as follows: "The burden of proof is upon the plaintiffs to show these facts by a preponderance of the evidence. When the plaintiffs have so shown that the twine was so furnished the defendant upon the order of Howard, and have shown either that said Howard was at the time acting as the duly authorized agent of the defendant for that purpose, or have shown that such act upon his part, though not authorized at the time, was afterwards ratified by the defendant, such facts would constitute a sale of the twine so shipped, and in such case the plaintiffs would be entitled to a verdict at your hands against the defendant in a sum equal to the amount you find was the value of said 6,000 pounds of twine at the time it was furnished, less \$165, with interest thereon at the rate of 7 per cent. per annum." The first part of instruction No. 2, which defendant admits was correct, reads as follows: "As the case is presented to you for your determination, it is claimed by the plaintiffs that W. A. Howard, acting as agent for the defendant, ordered the twine in question shipped to Guick & Paulson; that, in pursuance to said order, the plaintiffs shipped the twine to Guick & Paulson; that at the time

when said Howard so ordered the twine shipped, and, in pursuance thereof, the plaintiffs furnished the twine for shipment, the said Howard was acting as the duly authorized agent of the defendant for such purpose, or, if not so acting, that the defendant, the Acme Harvester Company, afterwards through its general agent having knowledge of the material facts touching the shipment ratified the acts of the said Howard." While this instruction is somewhat broader than the pleadings, it is clearly in line with the theory upon which both sides tried the case, and we think the court did not err in giving it. Counsel say this instruction was a direct and positive charge to find a verdict for the plaintiffs, leaving nothing whatever for the jury to find as to the facts or the weight of the testimony. In this we think counsel are in error.

It is claimed that instruction No. 3 is inconsistent with instruction No. 2, and does not state the contention of the defendant. Instruction No. 3 reads as follows: "It is the claim of the defendant that it did not purchase the twine in suit from the plaintiffs, and that its only connection with the transaction is that W. A. Howard, its agent with limited authority, acted in the matter of the sale by the Herpolsheimer Implement Company, its local agent at Hastings, to Guick & Paulson, its local agent at Trumbull, of the twine, and that later, when Howard called upon the plaintiffs for payment of the amount due upon their implement account to the defendant, plaintiffs instructed the said Howard to collect from Guick & Paulson the amount due from plaintiffs to defendant, and that the said Howard, as so instructed, collected such amount and remitted the same to defendant." We cannot agree with counsel that this does not state the contention of the defendant. On the contrary, we think it is a very clear statement of its contention.

In the concluding paragraph of their brief, counsel for defendant call attention to a number of the rulings of the trial court in the admission of testimony. We have

Gauvreau v. Van Patten.

examined the record, and are unable to say that there is reversible error in any of the instances pointed out.

An examination of the entire record satisfies us that the case was fairly presented to the jury under proper instructions on conflicting evidence, and that there is ample evidence in the record to sustain the verdict. The judgment of the district court is therefore

AFFIRMED.

EDWARD L. GAUVREAU, APPELLANT, v. CHARLES I. VAN
PATTEN, APPELLEE.

FILED DECEMBER 17, 1908. No. 15,806.

1. **Elections: BALLOTS: MARKING.** The provision in section 155, art. I, ch. 26, Comp. St. 1907, that "no elector shall place any mark upon his ballot by which it may afterwards be identified as the one voted by him," and the instruction given in schedule B, sec. 159 of said chapter, "Do not make any mark on the ballot save as above directed," are directory only.
2. ———: ———: ———. Where an elector, who has already regularly and in due form voted for candidates for all of the offices designated on the official ballot, attempts to vote for a person for some office not designated on such official ballot by writing on another part of his ballot the name of such person and the office which he desires him to fill, such marking of said ballot will not avoid the ballot as to the candidates for whom he properly voted for such designated offices, unless it appears from an inspection of the ballot, aided by evidence *aliunde* if offered, that such marking was done for the purpose of distinguishing the ballot, or might be reasonably thought so to be intended.

APPEAL from the district court for Adams county:
HARRY S. DUNGAN, JUDGE. *Affirmed.*

John C. Stevens and Walter M. Crow, for appellant.

R. A. Batty and J. W. James, contra.

FAWCETT, J.

On April 7, 1908, a general city election was held in the city of Hastings for the election of one councilman from

each ward of the city. In the Second ward there were two candidates for election, each of whom had been nominated by petition, viz., E. L. Gauvreau, whom we will designate as plaintiff, and C. I. Van Patten, whom we will designate as defendant. The official ballot prepared by the city clerk was as follows:

"OFFICIAL BALLOT.

"SECOND WARD.

"FOR COUNCILMAN. Vote for ONE.

"E. L. GAUVREAUBy petition ☐
"C. I. VAN PATTEN.....By petition ☐
"..... ☐

The result of the election as found by the canvassing board gave defendant 294 votes and plaintiff 261. Plaintiff, in the county court of Adams county, instituted proceedings to contest said election, claiming that 87 illegal votes had been counted for defendant. There was a trial in the county court, which resulted in a finding that 47 votes had been counted for defendant which ought not to have been so counted, and judgment that plaintiff had been elected by a majority of 12. A writ of ouster was issued and plaintiff put in possession of the office. Defendant thereupon took an appeal to the district court. The district court found that there were cast and counted for defendant 294 votes, of which 238 were regular in all respects and had no marks thereon except the cross made within the square; that there were cast and counted for plaintiff 261 votes, 255 of which were regular in all respects and had no marks thereon except the cross in the square opposite the name of plaintiff, and further found that defendant had been elected councilman by a majority of 29 votes. A writ of ouster was issued and defendant put in possession of the office. From the judgment of the district court this appeal is prosecuted.

Upon 44 ballots which the district court found had markings on, but were still legal, the voters had regularly

and in due form made their 'X' in the square opposite defendant's name. After doing so, they, for some reason not explained in the record, wrote upon their ballots, in some instances below and in others above the space designated for voting for councilman, one or the other of the following: "U. S. Rohrer for mayor [X];" "Rohrer for mayor [X];" "For mayor U. S. Rohrer [X];" "J. M. Daily for city treasurer [X];" "For city treasurer, J. M. Daily [X];" "U. S. Rohrer for mayor." Objections were made to some of the other ballots cast for each of the parties, but, as a determination of the legality of the 44 votes above referred to will determine which of the two candidates was elected as councilman, we deem it unnecessary to consider any of the other ballots. To the counting of the 44 ballots above referred to, plaintiff objected, basing his objection on the things written thereon. The above 44 ballots being conceded by both parties to be as above described, the only question for consideration is one of law.

Section 155, art. I, ch. 26, Comp. St. 1907, among other things, provides: "No elector shall place any mark upon his ballot by which it may afterwards be identified as the one voted by him. * * * Whoever shall violate any of the provisions of this section shall, upon conviction thereof in any court of competent jurisdiction be fined in any sum not less than twenty-five dollars nor more than one hundred dollars, and adjudged to pay the costs of prosecution." In section 159, schedule B, entitled "Instructions to Voters," it is said: "Do not make any mark on the ballot save as above directed." Prior to 1899 there was added to this clause of schedule B the words "or the ballot will not be counted." In 1899 the legislature, evidently concluding that that penalty was too drastic, eliminated the words "or the ballot will not be counted," so that schedule B now stands simply as an admonition to the voter not to make any mark on the ballot save as above directed. The penalty provided, therefore, for marking a ballot other than as directed is a fine of not less than \$25

nor more than \$100; but the marking which would subject the voter to such penalty in our judgment is such a marking that the ballot could afterwards be identified as the one voted by him, and not any such marking as would not so identify the ballot; the purpose of the law being to preserve the secrecy of the ballot, and to prevent designing persons from corrupting a voter and arranging with him for a private marking which would enable him to prove that he had "delivered the goods." In *State v. Russell*, 34 Neb. 116, Mr. Justice POST quotes from the statute the paragraph, "No elector shall place any mark upon his ballot by which it may afterwards be identified as the one he voted," and then says: "It will be noticed that a ballot marked in violation of the foregoing provision is not declared to be void. The force of the objection is apparent, however, if the effect of our construction would be to defeat or interfere with the secrecy of the ballot, since that is one of the primary objects of the law. The construction which we have given the statute will not, however, be attended with any such effect. It is not every mark by means of which a ballot might subsequently be identified which is a violation of the statute. The mark prohibited by law is such a one, whether letters, figures, or characters, as shows an intention on the part of the voter to distinguish his particular ballot from others of its class, and not one that is common to and not distinguishable from others of a designated class. * * * We are aware that our views on this branch of the subject are not in harmony with the recent cases in the supreme court of Connecticut, viz., *Talcott v. Philbrick*, 59 Conn. 472, and *Fields v. Osborne*, 60 Conn. 544. In the last case, under a statute substantially like ours, but which authorizes the printing of tickets by the respective political parties, it was held that the name on the tickets of one party, of a candidate for judge of probate when said office could not be filled at that election, and on the other of additional words descriptive of one of the offices, were distinguishing marks for which the ballots of both parties should be re-

Gauvreau v. Van Patten.

jected. To our minds, however, the reasoning of the dissenting judges is the more satisfactory and convincing and certainly more in accord with the weight of authority. We think, too, that the construction given our statute is most promotive of fairness and purity in elections, and less liable to result in the disfranchising of honest voters through mere omissions or mistakes of their own or the negligence or design of public officers." A careful reconsideration of the above reasoning by Mr. Justice POST has confirmed us in our opinion of the soundness of his reasoning and the justness of his conclusions.

Section 151, art. I, ch. 26, provides: "In the canvass of the votes any ballot which is not indorsed as provided in this act by the signature of two (2) judges upon the back thereof, shall be void and shall not be counted, and any ballots or parts of a ballot from which it is impossible to determine the elector's choice shall be void and shall not be counted, provided, that when a ballot is sufficiently plain to gather therefrom a part of the voter's intention, that it shall be the duty of the judges of election to count such part." In commenting on that section in *State v. Russell, supra*, it is said: "It may be contended by respondent's counsel, that the proviso in the last section was intended to apply only to ballots otherwise regular, but on which the voter has failed through negligence, illiteracy, or other cause to clearly express his intention as to every office named thereon. The inference is strong, however, from the language of the several sections to which reference has been made, that the legislature, by declaring a limited number of provisions to be mandatory, and a compliance therewith essential to a legal ballot, intended the other provisions as directory only." Mr. Wigmore, in an appendix to the second edition of his treatise on the Australian Ballot System, p. 193, after examining all of the reported cases upon that branch of the subject, concludes in the following language: "Wherever our statutes do not expressly declare that particular informalities avoid the ballot, it would seem best to consider their require-

ments as directory only. The whole purpose of the ballot as an institution is to obtain a correct expression of intention; and if in a given case the intention is clear, it is an entire misconception of the purpose of the requirements to treat them as essentials, that is, as objects in themselves, and not merely as means." To the same effect are *Bingham v. Broadwell*, 73 Neb. 605; *Griffith v. Bonawitz*, 73 Neb. 622.

In *Parker v. Hughes*, 64 Kan. 216, it is said: "Mr. Justice Ellis is of the opinion that not only must those ballots which are marked in the manner forbidden by section 25 be excluded, but also ballots marked in contravention of the terms of the penal section 27—that is, a ballot bearing a distinguishing mark purposely made should be rejected if the mark is of such nature, or is so placed on the ballot, that the judges or courts might find, in the absence of testimony, or upon testimony if offered, that there were reasonable grounds for believing that such mark was made by the voter with the intent that his ballot should be distinguished from others in the box; that, in determining what ballots should be counted, the court should look at the questioned one and from such inspection, aided by the notorious facts and circumstances of the election at which it was cast, determine whether the questioned mark was intended by the voter as a distinguishing mark or not, and if, upon such inspection and consideration, aided by evidence *aliunde* if offered, the court should conclude that the mark was made for the purpose of distinguishing the ballot, or might be reasonably thought so to be intended, the ballot should not be counted." In that case 176 ballots had been doubly marked by reason of the fact that the name of the candidate for whom the electors were voting appeared upon the ticket under the title "Democratic Party," and also under the title, "Citizens' Ticket." In commenting on that fact the Kansas court say: "It is not contended by the defendant that these double marked ballots, of which there are some 176, are in terms excluded from the count by the

statute, but only that they must be excluded because such double marking constitutes a distinguishing mark, by which it may be inferred that the voter sought to distinguish his ballot for the purpose of being able to assure a purchaser of votes that he had 'delivered the goods.' It must be admitted that these marks do not necessarily indicate a corrupt purpose. It is as reasonable, or more reasonable, to say that the voter so marked his ballot out of a superabundance of caution, or because he found Mr. Parker's name printed twice and supposed therefore that he was to put down two crosses, as to say that his act must be explained upon the hypothesis of a corrupt motive. This is made doubly forceful when we remember the large number of ballots so marked, coming from all parts of the city. It is the duty of the court to ascertain the intent of the voter, and, if it may fairly and reasonably deduce a motive consonant with honesty, rather than dishonesty, from his ballot, to count the same for the candidate of his choice, rather than to disfranchise him. A distinguishing mark, to warrant the rejection of the ballot, must be found to have been made for the purpose of identification."

In line with the reasoning of the Kansas court, the large number of ballots (44) marked as hereinbefore indicated, cast by that many different voters, negatives the idea that the ballots were so marked with the intention on the part of the voter to distinguish his ballot in such a manner that it might be identified as the one cast by him. So far as the office of councilman was concerned, the voters so marking their ballots could not have been actuated by corrupt or improper motives. They had already regularly and properly marked their ballots for the office of councilman, and the writing of the names of Mr. Rohrer for mayor or Mr. Daily for treasurer in no manner affected their votes for councilmen. What their motive may have been in attempting to vote for a mayor and treasurer in addition to the votes which they had cast for councilman is not explained in the record, and we cannot impute to

them any corrupt or improper motive. That they all intended to vote for the defendant for councilman is clear and unmistakable, and, in the absence of a statute avoiding their ballot for what they did in addition thereto, we think it would be doing violence to the spirit of our election law to refuse to count the 44 ballots in controversy for defendant. The district court therefore did not err in so counting them. With these 44 votes credited to defendant, he had a clear majority over the plaintiff for councilman, and was duly elected.

The judgment of the district court is therefore

AFFIRMED.

D. J. O'BRIEN COMPANY, APPELLEE, V. OMAHA WATER
COMPANY, APPELLANT.

FILED DECEMBER 17, 1908. No. 15,409.

1. **Waters: DEFECTIVE HYDRANT: QUESTION FOR JURY.** Where there was evidence to show that a fire hydrant which broke and flooded plaintiff's cellar was in a leaky condition for more than 48 hours before its collapse, the question whether the leaky condition indicated the defect which culminated in its bursting was one of fact, and for the jury.
2. **Instructions examined, and found to be without error.**
3. **Trial: INSTRUCTIONS.** It is not error to refuse an instruction, the substance of which is embraced in the charge given by the court on its own motion.
4. ———: ———: **CONTRIBUTORY NEGLIGENCE.** Where there is no evidence of plaintiff's contributory negligence, instructions submitting that question to the jury are properly refused.
5. **Contributory Negligence** is a matter of defense to be pleaded by defendant, and need not be negated in the petition. First paragraph of syllabus in *Chicago B. & Q. R. Co. v. Kellogg*, 55 Neb. 748, and *Chicago, St. P., M. & O. R. Co. v. Lagerkrans*, 65 Neb. 566, disapproved.
6. **Evidence of Value.** In an action to recover the value of goods negligently destroyed, the fact that a witness testifying to the

D. J. O'Brien Co. v. Omaha Water Co.

market value thereof has based his estimate upon the cost does not make his testimony incompetent when it further appears that said cost was less than the market value of such goods.

7. **Appeal: PLEADING: AMENDMENT AFTER VERDICT.** Where an application to amend a petition so as to demand interest on the value of goods destroyed is made after the coming in of the verdict, and no showing of facts excusing the delay appears, the judgment of the district court denying such application will not be disturbed.

APPEAL from the district court for Douglas county:
WILLIAM A. REDICK, JUDGE. *Affirmed.*

Hall & Stout, for appellant.

McGilton & Gaines, contra.

CALKINS, C.

The defendant, under a contract with the city of Omaha, furnishes water to the city for fire purposes and to the public for private use. The plaintiff was a manufacturer of candy, occupying a building at the corner of Twelfth and Howard streets. A fire having broken out in the neighborhood on Saturday evening, January 28, 1905, a fire engine was attached to a hydrant which defendant had installed at the said corner, and it was used in extinguishing such fire until about 10 o'clock Sunday morning, when it was detached. Shortly afterwards the employees of the city, under direction of the foreman of the sewer department, attached hose to this hydrant, and used the same to syphon out the cellar of a neighboring building which had been flooded by the water used to extinguish the fire. This use was continued during the afternoon of Monday, January 30, when, while the said employees were endeavoring to close the hydrant, a large section of the bottom thereof broke out, releasing the water to practically the full capacity of the pipe connecting the hydrant with the main. This resulted in the flooding of plaintiff's cellar and the destruction of a large portion of the goods stored

therein. This action was brought to recover the value of the goods destroyed, on the grounds, first, that the hydrant was originally installed in a negligent manner; and, second, that defendant negligently failed to repair the same after it became in a leaky condition. There was a verdict for the plaintiff, and from the judgment rendered thereon the defendant appeals.

1. The defendant contends that there was not sufficient evidence to support a verdict for plaintiff, and that the court should have so directed the jury. An examination of the hydrant after its removal showed that a large piece was broken out of the bottom or heel thereof, which was constructed of cast iron. There was evidence tending to show that for from one-half to two-thirds of the way around the fracture the iron was rusted, while the remainder showed a freshly broken surface. There was evidence also tending to show that the hydrant was leaking from shortly after the time at which the engine was attached to it until its final collapse. It further appears that, following a custom of long standing, the fire department had notified the defendant that this hydrant had been used; and the defendant had, in accordance with its custom, sent an inspector to examine the same. The plaintiff contends that these facts tended to show first that the hydrant was cracked and in a defective condition; second, that this defective condition was indicated by the leakage of the hydrant during the time it was used in extinguishing the fire and syphoning out the said cellar; and, third, that the defendant was negligent in not ascertaining the cause of the leaky condition and repairing the defect.

If the testimony of the plaintiff's witnesses was true, and the court before it could direct a verdict against the plaintiff must so assume, the facts above stated were established, and there only remains to be considered the question whether negligence might be inferred from those facts. The defendant places much stress upon the testimony of its inspector, who says that he examined this hydrant after the fire and found it in good condition. The

flaw in defendant's argument consists in the assumption that this testimony must be true and that it conclusively establishes that the hydrant was not leaking. It is inconsistent with the testimony of the plaintiff's witnesses as to its leaky condition, and, it being a question for the jury to decide, they must be taken to have determined it against the defendant. Whether the leaking of the hydrant should have indicated to the defendant its defective condition is the crucial question in the case, and it was peculiarly one for the jury. As has been repeatedly said, the existence of negligence is generally a question of fact. It is for the jury to determine where the facts are disputed, or where from the undisputed facts different minds may reasonably draw different conclusions as to the existence of negligence.

2. The eighth instruction given by the court on its own motion is as follows: "The gist of this action is negligence, the plaintiff alleging as its claims of negligence (1) that the hydrant was originally installed in a negligent manner, and (2) that defendant negligently failed to repair the same after it became in a leaky condition; but you are instructed that there is no evidence which would warrant you in finding that defendant was negligent in placing or installing the hydrant in question, and your inquiry as to defendant's negligence will be confined to the second ground claimed by plaintiff, as above stated. And on this point you are instructed that it is not sufficient for plaintiff to establish merely that the hydrant was in a leaky condition, and that it finally burst and damaged its property, but it must further establish by a preponderance of the evidence that defendant knew, or by the exercise of ordinary care ought to have known, of its defective condition, and negligently failed to repair it; though you find the hydrant in question was leaky and out of repair, still, if defendant discovered its condition as promptly as ordinary care required, and repaired or replaced the same with reasonable despatch, it would not be liable." The defendant argues that the two paragraphs of instruction

No. 8 are inconsistent, and that the court by it told the jury that, if the hydrant was in a leaky condition, it was defective. The court in its instruction No. 4 had already told the jury that the burden of proof was upon the plaintiff to establish by a preponderance of the evidence that the hydrant in question was defective; and the effect of this instruction was merely to withdraw from the jury the question of negligence in its installation. We do not think the criticism is just. There was evidence upon which it could be fairly based, and it was quite as favorable to defendant as it was entitled to demand.

The defendant also criticizes the second paragraph of the ninth instruction, in which the jury were told: "Upon the other hand, if you find from a preponderance of the evidence that the hydrant was in a defective or leaky condition, and that the defendant negligently failed to discover such condition and repair it before the same was broken, and that without the existence of such negligence on the part of the defendant the hydrant would not have broken, then the defendant would be liable, even though the negligence of the employees of the sewer department may have concurred in producing the injury." It is argued that by this instruction the court told the jury that, if the hydrant was in a leaky condition, that was evidence of the defect in the heel. This criticism is apparently based upon the proposition that the court should have used the word "and" instead of the disjunctive "or." We think it is plain that the court used the two words as synonymous, and that the jury could not have been misled thereby. The only defect that was discovered in the hydrant upon its removal was the break in the heel, and no other cause for its leaky condition is suggested or proved.

3. The defendant complains of the refusal of the court to give two instructions tendered by it as follows: "(1) You are instructed that unless the plaintiff has satisfied you by a preponderance of the evidence that the hydrant which broke at Twelfth and Howard streets was in a de-

fective and leaky condition prior to the 28th day of January, 1905, and that said defendant knew of said defective and leaky condition or by ordinary care and diligence should have known of such defective and leaky condition, then your verdict should be for the defendant. (2) The jury are instructed that plaintiff cannot recover from said defendant any sum whatever unless it has satisfied you by a preponderance of the evidence that the broken condition at the foot of the hydrant, if such condition existed prior to the time of the actual breaking out at the foot of the hydrant, was in such condition as to have warned a reasonably prudent and careful person that said hydrant was defective at the bottom thereof, and it was defendant's duty to repair the same." The effect of the first instruction was to relieve the defendant of any care of said hydrant for the 28th, 29th and 30th days of January, while the principle embodied in the second had already been given to the jury in instruction No. 8 of the court. The court did not, therefore, err in refusing to give the first, and to repeat itself by giving the second.

4. The defendant also complains of the refusal of the court to give instructions numbered 5 and 6 requested by it, in each of which the question was whether the loss suffered by the plaintiff, or any portion thereof, was due to its contributory negligence. As there was no evidence of any contributory negligence on the part of the plaintiff, it would have been error to submit the question to the jury. *Clingan v. Dixon County*, 74 Neb. 807; *Chicago, B. & Q. R. Co. v. Schalkopf*, 54 Neb. 448.

5. It is further contended by the defendant that, because the plaintiff failed to formally allege in its petition that it was without fault, such petition does not state facts sufficient to constitute a cause of action. The great weight of authority is that contributory negligence is a matter of defense to be pleaded by defendant, and need not be negatived in the petition. The cases from other jurisdictions are too numerous to cite, but a reference to them will be found under the title "Negligence" in 37

American Digest, sec. 186. This court having adopted the rule that contributory negligence is an affirmative defense, the burden of proving which is upon the party pleading it (*Rapp v. Sarpy County*, 71 Neb. 382, 385), it logically follows that the plaintiff should not be required to negative such defense. This principle has been recognized in *Union Stock Yards Co. v. Conoyer*, 41 Neb. 617, and *Cook v. Chicago, R. I. & P. R. Co.*, 78 Neb. 64.

But a different rule seems to be announced in the first paragraph of the syllabus in *Chicago, B. & Q. R. Co. v. Kellogg*, 55 Neb. 748. In that case the defendant was contending that the petition was insufficient because it contained no averment that the defendant knew, or ought to have known, of the defective appliance which was responsible for the accident. The petition appears to have contained the allegation that the plaintiff without fault on its part sustained an injury as the proximate consequence of the negligent acts charged against the defendant; and the question we have here presented was not before the court, and evidently not in the mind of the judge writing the opinion. There is a similar statement in the last clause of the first paragraph of the syllabus in *Chicago, St. P., M. & O. R. Co. v. Lagerkrans*, 65 Neb. 566. In this case the petition appears to have contained the allegation that the defendant "carelessly and wrongfully and negligently caused the death of said deceased, without any fault, carelessness or negligence of said deceased." Here again the question whether the petition would have been good without the allegation that the accident occurred without any fault upon the part of the injured person was not presented to the court. It is a fundamental principle that cases are only authority where the question to which they are applied was presented to the mind of, and necessarily decided by, the court; and the cases referred to are not, therefore, opposed to the conclusion we have reached. As the syllabi referred to, taken by themselves, would seem to enunciate a different rule, we have deemed it best to call attention to them, and to

say that, in so far as the same conflict with the conclusion we have here reached, they are disapproved.

6. Finally, the defendant insists that the case must be reversed for errors in proving the value of the goods destroyed. Mr. D. J. O'Brien, the president of the plaintiff, was the witness by whom the plaintiff proved the value of these goods. He testified that he had been engaged in the business of manufacturing candy for 30 years, and was familiar with the value of the articles destroyed. In response to the question as to what was the fair and reasonable market value of the goods before and after the damage, he testified, giving the value of each article item by item, and stating, in most instances at least, that the same was totally destroyed. Afterwards he was asked: "Q. Now, when you have given your testimony as to their value, state what value, Mr. O'Brien, you have given. A. The cost value to us. Q. The cost value to you? A. Yes, sir. Q. Is that more or less than their fair market value, selling at Omaha at that period? A. It is less than their selling price." The defendant claims that this admission of the witness made his testimony as to the market value incompetent, and cites in support of its position the case of *McCook v. McAdams*, 76 Neb. 1. In that case the plaintiff and another witness, after having testified that they had made an estimate of the damage to the goods, gave the amount in gross. It appeared that these estimates were based in part upon the original cost of the goods, and the court states that this is not a proper basis for the computation of damages, because it frequently happens that goods on the shelves of a merchant are worth but a fractional part of their cost. The most serious objection to the testimony in that case was the fact that the witness was allowed to estimate the damage in gross. In the instant case the witness gave the market value of the goods in detail item by item, and afterwards, upon being examined upon that point, stated that he had based his estimate upon the cost to the plaintiff. If he had stopped at this point, the argument that his estimate

was infected with one vice found in the estimate of the witnesses in *McCook v. McAdams*, *supra*, would have been plausible; but he was then asked whether their cost was more or less than their fair market value sold at Omaha at that period, and he answered that it was less than their selling price. The plaintiff was entitled to recover the market value of the goods at Omaha. It was engaged in the manufacture and jobbing of these goods in the Omaha market. The market value of goods in any particular market is determined by the price at which they are selling in such market. There is therefore no distinction between the market value and the selling price. In this case it appears that, in estimating the value of the goods, Mr. O'Brien gave the defendant the benefit of the plaintiff's profits as manufacturer and jobber, and of this the defendant should not complain.

7. The plaintiff did not in its petition demand interest upon the amount of the value of the damaged goods from the date of such damage to the time of the trial; but, after the coming in of the verdict, the plaintiff filed an application for leave to amend its petition to demand the same, and for an order of the court adding to the verdict interest from the date of the loss to the date of the verdict. This application was denied. There is nothing in the record to show what, if any, excuse was given to the court for the plaintiff's delay in asking this amendment, and, in the absence of such showing, we cannot say that the court abused its discretion in refusing the plaintiff permission to make such amendment. If the amendment had been permitted, the right of the court to add interest to the amount of the verdict would have been doubtful. The only case in point we have been able to find is that of *Hallum v. Dickinson*, 47 Ark. 120, 14 S. W. 477, which holds that a court cannot add interest to a verdict.

We therefore recommend that the judgment of the district court be affirmed.

FAWCETT and ROOT, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

JOSEPH W. DUNKIN, APPELLEE, v. E. B. BLUST ET AL.,
TRUSTEES, APPELLANTS.

FILED DECEMBER 17, 1908. No. 15,555.

1. **Municipal Corporations: IMPLIED POWERS: JAILS.** The power of a village to build a jail is necessarily and fairly implied from and incident to the power expressly granted the village to enforce its ordinances by fine and imprisonment.
2. **Nuisance: JAILS.** A village jail properly constructed and suitably situated, is not *per se* a nuisance.
3. **Municipal Corporations: UNAUTHORIZED EXPENDITURES: INJUNCTION.** The making and publication of the estimate of expenses required by section 87, art. I, ch. 14, Comp. St. 1907, should precede the appropriation of money for village purposes; and the village board will be restrained from proceeding with an expenditure without such estimate upon the timely application of a taxpayer.

APPEAL from the district court for Buffalo county:
BRUNO O. HOSTETLER, JUDGE. *Affirmed as modified.*

R. M. Thompson and W. H. Thompson, for appellants.

W. D. Oldham and H. M. Sinclair, contra.

CALKINS, C.

The plaintiff is a citizen and taxpayer, and the defendants are trustees of the village of Ravenna. This action was brought to restrain the defendants from constructing a village jail upon lots owned by said village, upon the grounds: First, that the village had no express or implied power to build a jail; second, that the lots upon which the defendants proposed to erect the jail had been set apart for a park and for that reason the village was without authority to build the jail at that place; third, that the

jail, when built, would be a nuisance, and an irreparable injury to the plaintiff, who owned an adjoining lot; fourth, that no appropriation of funds to defray the expense of constructing such jail had previously been made, and that no estimate of the expense thereof had been made and published as required by the charter act governing said village. There was a trial to the court, a general finding for the plaintiff, and a judgment perpetually enjoining the defendants from constructing said jail. The defendants appeal.

1. No specific power in the village to construct a jail is pointed out; but the charter imposes upon the board of trustees the duty of maintaining the peace, good government and welfare of the village, its trade, commerce and manufactures, and power to enforce its ordinances by fine and imprisonment. It is urged that the power to maintain a jail is necessary to the exercise of such specifically granted powers. It is a general principle that a municipal corporation possesses and can exercise, in addition to the powers expressly granted, such powers as are necessarily and fairly implied in or incident to powers expressly granted. The plaintiff, while conceding that it is necessary for a village to have some place for the confinement of such persons as may be liable to imprisonment under the ordinances thereof, points out section 73 of the charter (Comp. St. 1907, ch. 14, art. I) which provides that any city or village shall have the right to use the jail of the county for the confinement of such persons as may be liable to imprisonment under the ordinances of such city or village, and argues that this provision obviates the necessity for the construction of a jail by said village. Evidence in this case shows that this village is situated 30 miles by wagon road from the county seat, and with no direct communication by rail; that it is a division station of the Chicago, Burlington & Quincy Railway Company, and has a population of more than 800 people. It is plain that the necessity for a village jail is

not obviated by the right to use the county jail situated more than 30 miles away. We think, under the rule above quoted, the power in this village to erect a jail is necessarily and fairly implied from and incident to the power to enforce its ordinances by fine and imprisonment.

2. There was no evidence to support the allegation that the lots upon which it was proposed to erect the village jail had been set aside for a park. On the contrary, it appears that a building for the manufacture of gas by the village, and a building in which to store the hose for fire protection, had already been placed upon these lots, and that the site was not unsuitable for the erection of the proposed jail. We do not think that a village jail is *per se* a nuisance, and there was no evidence to show that it was likely to become such. *Wehn v. Commissioners of Gage County*, 5 Neb. 494.

3. We are satisfied that no estimate nor appropriation was made which complied with the provisions of sections 86, 87, art. I, ch. 14, Comp. St. 1907. The evidence shows that the estimate of expenditures thereof, and the ordinance appropriating money for the construction of such jail were both passed on the 3d day of June, 1907, and were not published the first time until the 7th of the same month. The petition in this action was filed on the 4th, and the summons served on the defendants the 5th of the same month. It will therefore be seen that at the time of the commencement of the action the trustees had not complied with section 87, *supra*, which provides that, before the annual appropriation bill shall be passed, the trustees shall prepare an estimate of the probable amount of money necessary for all purposes to be raised in said village, and enter the same at large upon its minutes, and cause the same to be published four weeks in some newspaper published or of general circulation in the city or village. The plaintiff cites the case of *City of Plattsmouth v. Murphy*, 74 Neb. 749, and this case, with the cases cited in the opinion, is authority for the doctrine that the provision for the appropriation is mandatory, and

therefore essential to the validity of contracts made or obligations entered into by the village involving the expenditure of funds so appropriated. The question whether the failure to make and publish the estimate before the appropriation invalidates the latter has not been determined in any of the cases brought to our attention. The purpose of the statute requiring such estimate to be made and published before the passage of the annual appropriation bill is to give publicity to the intention of the trustees concerning expenditures to be made for the coming year. It is not necessary to, and we do not, determine whether the failure to make such estimate prior to the passage of the appropriation ordinance, would invalidate executed contracts, or relieve the village of liability for expenditures of which it had received the benefit; but we think there can be no question that, where the trustees undertake to proceed without such estimate, and the taxpayer makes timely application for an injunction to prevent their so proceeding, they should be restrained. There is no other remedy, unless we say that the failure to make the estimate invalidates all expenditures made or contracted under the appropriation. It would then fall within the rule stated by Dillon, J., in 2 Dillon, Municipal Corporations (4th ed.), section 922, that "the proper parties may resort to equity, and equity will, in the absence of restrictive legislation, entertain jurisdiction of their suit against municipal corporations and their officers when these are acting *ultra vires*, or assuming or exercising a power over the property of the citizen, or over corporate property or funds, which the law does not confer upon them, and where such acts affect injuriously the property owner or the taxable inhabitant." In either case injunction is the proper remedy. *Poppleton v. Moores*, 62 Neb. 851; 67 Neb. 388.

We therefore recommend that the judgment of the district court be modified so as to enjoin the defendants from constructing such jail, upon the ground that no proper estimate and appropriation had been made at the time of

the commencement of the action, and that, so modified, the judgment be affirmed.

FAWCETT and ROOT, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is modified so as to enjoin the defendants from constructing said jail, upon the ground that no proper estimate and appropriation had been made at the time of the commencement of this action, and, so modified, the judgment is affirmed.

AFFIRMED AS MODIFIED.

ROBERT J. GREENE V. STATE OF NEBRASKA.

FILED DECEMBER 17, 1908. No. 15,731.

1. **Constitutional Law: SPECIAL LEGISLATION.** Section 3 of the act of March 30, 1901 (laws 1901, ch. 93), contravenes section 15, art. III of the constitution of the state of Nebraska, which forbids special legislation, as well as section 1 of the fourteenth amendment to the constitution of the United States, which forbids a state to deny to any person within its jurisdiction the equal protection of the laws, in that the acts thereby prohibited are made criminal only when committed against citizens or residents of the state of Nebraska.
2. ———: ———. The rule that a court will not listen to an objection made to the constitutionality of a law by a party whose rights it does not affect is inapplicable to a case where the vice of the law consists in an unwarranted discrimination between the individuals against whom the aggression thereby forbidden is committed.

ERROR to the district court for Lancaster county:
ALBERT J. CORNISH, JUDGE. *Reversed and defendant discharged.*

Greene & Greene, L. C. Burr, H. F. Rose and T. J. Doyle, for plaintiff in error.

William T. Thompson, Attorney General, Grant G. Martin and Frank M. Tyrrell, contra.

CALKINS, C.

The plaintiff in error, hereinafter called the defendant, was indicted with his alleged partner for a violation of the provisions of section 3 of the act of 1901. Laws 1901, ch. 93; criminal code, sec. 46d. It was charged that the defendants, who were alleged to be attorneys at law, conspired together to sue a large number of saloon-keepers just prior to the time for the issuing of licenses; that the defendants would then threaten to file remonstrances against the issuing of such licenses, and by means of such threats obtain money from such saloon-keepers. This defendant demanded a separate trial, which was granted; and the state elected to proceed against him upon the charge of extorting \$150 from one Clyde Lester. There was a verdict of guilty, and a judgment that the defendant pay a fine of \$200 from which he prosecutes error to this court.

1. Section 3 of the act of 1901 is as follows: "Any person or persons who shall by threats, intimidation, coercion, extortion, injunction, conspiracy, deception or subterfuge, obtain, or seek to obtain, money or other valuable consideration, or shall cause the same to be done directly or indirectly, from any citizen or resident of this state, or compel them to perform any act not consistent with common law or equity, or who shall by such threats, coercion, intimidation, extortion, injunction, conspiracy, deception or subterfuge, induce any citizen or resident of the state of Nebraska to surrender anything of value or relinquish any right guaranteed by the laws of Nebraska, in consideration of the withdrawal of said threats, coercion, intimidation, extortion, injunction, conspiracy, deception or subterfuge, shall be deemed guilty of blackmail, and upon conviction thereof shall be confined in the penitentiary for not more than three years nor less than one year, or be fined not less than two hundred (\$200) dollars, nor more than five hundred (\$500) dollars' for each and every offense." From a reading of this section it will

appear that its protection is confined to citizens or residents of the state of Nebraska. In this respect the statute appears to be *sui generis*; our attention not having been called to any similar enactment. We have, therefore, presented the question whether the legislature of a state may limit the protection of its criminal laws to its own citizens and persons resident within its boundaries. Giving to the term residents its widest possible construction, there must be constantly within the limits of the state a large number of persons who are neither citizens nor residents thereof. A just appreciation of the importance of the question involved will be best obtained by supposing the criminal code to be amended to conform to the policy adopted by the statute in question. The statute against homicide would then provide that if any person shall purposely and of premeditated malice kill a citizen or resident of the state of Nebraska, etc.; the statute against robbery, if any person shall forcibly or by violence and putting in fear take from the person of a citizen or resident of the state of Nebraska any money, etc.; the statute of arson, if any person shall wilfully and maliciously burn or cause to be burned any dwelling house, etc., the property of any citizen or resident of the state of Nebraska, etc. Such legislation we believe to be inhibited by section 15, art. III of our constitution, prohibiting special legislation, and clearly forbidden by section 1 of the fourteenth amendment to the constitution of the United States, which provides that no state shall deny to any person within its jurisdiction the equal protection of the laws. We are forced to conclude that the statute is void, and that no conviction can be had thereunder.

2. We have not overlooked those cases which hold that a court will not listen to an objection made to the constitutionality of an act by a party whose rights it does not affect, and who has therefore no interest in defeating it. Where the constitutional objection is that the penalties of the law are directed against a certain class without any just reason for such discrimination, it is safe to

leave the question of the constitutionality of such laws to be raised by the parties against whom the discrimination is made; and such have been the facts in all the cases we have examined laying down this rule. It is inapplicable to a case where the vice of the law consists in an unwarranted discrimination between the individuals against whom the aggression thereby forbidden is committed. In such case there is no way by which any person within the jurisdiction of the state denied the protection of its criminal law could bring the question before a court for its determination. If the legislature should enact a law amending our criminal code so that the crimes therein specified should be crimes only when committed against citizens or residents of the state, such an act would be absolutely void, but its invalidity could never be brought before the court by any person belonging to the classes thereby denied the protection of the criminal law. If we apply to such a law the rule that its constitutionality would only be considered when the objection was made by a party discriminated against, there could be no objection of its invalidity. When such a law is sought to be enforced against any person, whether belonging to the classes discriminated against or not, it should be declared void.

We therefore recommend that the judgment of the district court be reversed and the defendant discharged.

FAWCETT and ROOT, CC., concur..

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the defendant discharged.

REVERSED.

ROSE, J., not sitting.

JOHN CERNY, APPELLANT, V. PAXTON & GALLAGHER COMPANY, APPELLEE.

FILED DECEMBER 17, 1908. No. 15,862.

1. **Appeal: REVERSAL.** Where a general verdict is set aside for errors occurring at the trial, no part of such verdict can be left to stand; but a new trial must be awarded upon all the issues of fact.
2. **Witnesses: PRIVILEGED COMMUNICATIONS: WAIVER.** Where a party voluntarily testifies in open court to conversations between himself and his attorney, he waives the right to have such communications considered as privileged, and the attorney thereupon becomes a competent witness to testify concerning the matters so disclosed by the client.
3. **Principal and Agent: CREDITOR OF PARTNERSHIP.** Where a creditor seeking to recover the payment of a debt from a partnership asks one partner to consult with his copartner, he does not thereby make the partner with whom he talks his agent, and, if such partner voluntarily makes false statements to his copartner, the creditor is not bound thereby, nor estopped to deny the same.
4. **Fraud: INSTRUCTIONS.** In an action to recover for fraud alleged to have been practiced by a promise made with the secret intention of not performing the same, an instruction that the plaintiff must establish not only that the promise was made, but that the same was made deceitfully with intention to defraud plaintiff, does not impose too great a burden of proof upon the plaintiff when the jury are at the same time told that, in order that the promise shall be deceitfully made, it must appear at the time of making such promise that the defendant had no intention of complying with the same.
5. ———: ———: **DAMAGES.** Where the mortgagee of a stock of goods sold the same in bulk, and the mortgagor brings an action against such mortgagee to recover the difference between the price at which the goods sold and their market value, on the ground that the mortgagee obtained the mortgage by fraudulent promises which he did not intend to perform, it is not error to instruct the jury upon the measure of damages that they should consider the value of the stock if sold in bulk, and not the price at which it might be sold at retail.

APPEAL from the district court for Douglas county:
GEORGE A. DAY, JUDGE. *Affirmed.*

George W. Cooper and Louis J. Piatti, for appellant.

T. J. Mahoney and J. A. C. Kennedy, contra.

CALKINS, C.

This was an action to recover the value of a stock of goods mortgaged by plaintiff to defendant, on the ground that the mortgage was obtained by a promise that the defendant would see that the goods brought upon sale a certain price, which promise the defendant fraudulently and deceitfully made with the secret intention of not performing it. The first trial resulted in a verdict and judgment for the plaintiff, which was reversed by this court (78 Neb. 134). The opinion by ALBERT, C., contains a full statement of the facts, which it is unnecessary to repeat. The second trial upon the same issues resulted in a verdict for the defendant, and from a judgment rendered thereon the plaintiff now appeals.

1. A reference to the former opinion will disclose that, while the defendant urged numerous errors, the cause was reversed for an error of the trial judge in an instruction to the jury as to the measure of damages. The order made by this court was that the cause be remanded for further proceedings according to law. It is contended that a trial *de novo* was not necessary to correct said error, and that on the second trial the district court should have submitted to that jury only the question of damages, leaving the former verdict to stand in all other respects. Whatever may be the rule where a case is tried by a court which states its conclusions of law and of fact separately, or to a jury to whom is submitted special findings, the practice has been to regard the setting aside of a general verdict by a jury as necessitating a reexamination of all the questions submitted to the jury in the trial which resulted in such verdict. The statutes regulating the course of procedure do not specifically provide for setting aside a verdict in part. On the con-

Cerny v. Paxton & Gallagher Co.

trary, the remedy provided for errors committed during a trial, as prescribed by section 314 of the code, is a new trial. We think we may say it is the universal practice for a trial court, upon granting a new trial under said section, to examine all the issues of the case, and that such a practice as setting aside a verdict as to some part of the issues of fact, and submitting such part to another jury, is altogether unknown. When a case brought to this court is sought to be reversed for any of the errors which are specified in section 314 of the code as ground for a new trial, the making of a motion in the district court for such new trial in the time and manner required by the statute is an essential prerequisite to the right of the party appealing to have such error considered in this court. In such cases the appeal is in effect an appeal from the order refusing a new trial. Under section 594 of the code which provides that, when a judgment or final order shall be reversed either in whole or in part in the supreme court, the court reversing the same shall proceed to render such judgment as the court below should have rendered, or remand the cause to the court below for such judgment, it logically follows that, since, when a cause is reversed for any of the errors specified in section 314, the court below should have rendered a judgment awarding a new trial, it is the duty of this court to either render the judgment granting a new trial, or remand the cause to the court below for such judgment.

The plaintiff cites the cases of the *Missouri, K. & T. T. Co. v. Clark*, 60 Neb. 406, and *Colby v. Foxworthy*, 78 Neb. 288, but in neither of the cases so cited was the precise question presented, nor does this case fall within the rule there laid down. Those cases and the cases cited in the majority opinion in *Missouri, K. & T. T. Co. v. Clark*, *supra*, are authority for the rule that after reversal of a judgment for error occurring subsequent to the trial, and where the findings or verdict were not disturbed, there is no necessity for a new trial; that in such a case the court should retrace its steps to the point where the first ma-

terial error occurred, and from that point the trial should progress anew. We are satisfied that where the error preceded the verdict, and the verdict is a general one, there must be a new trial upon all the issues of fact. The plaintiff cites, and quotes largely from the opinion in, the case of *Lisbon v. Lyman*, 49 N. H. 553; and it must be conceded that that case sustains the plaintiff's contention to the extent that this court should have upon the former hearing sent back the case for a new trial upon the one question of the measure of damages. The considerations urged by the writer of the opinion in that case would have carried great weight if addressed to a legislative body having the power to take away from the verdict of the jury its omnibus character and provide for specific findings of the different issues submitted to that body. They fail, however, to convince us that such is the law; and until the nature of the trial by jury is modified, and the character of their verdict is essentially altered, we doubt the beneficent effect of any attempt of the courts to by construction change the law so as to split the verdict of the jury into component parts, and try the several issues by different juries. We therefore must adhere to the rule that, where a general verdict is set aside for errors occurring at the trial, no part of such verdict can be left to stand, but a new trial must be awarded upon all the issues of fact.

2. The plaintiff Frank Cerny, being called as a witness, undertook to explain certain conduct with reference to attempting to borrow money to bid in the goods, which was supposed to be inconsistent with his reliance upon the promise alleged to have been made by the defendant, by saying that he had been told by Mr. John H. Lindale, an attorney at West Point, that the defendant and its attorney would not keep their promise. Lindale was called as a witness, and testified that his acquaintance with Frank Cerny began after the mortgage sale, and that he never told Frank Cerny that he could not rely upon any arrangement made with the defendant's attor-

ney. This evidence was received without objection until after the cross-examination, when the plaintiff moved to strike out the testimony on the ground that it appeared that the relation of attorney and client existed between Frank Cerny and the witness Lindale. The overruling of this motion is assigned as error. We think that, when the plaintiff testified to a conversation between himself and his attorney, he waived the privilege of such attorney, who thereupon became a competent witness to testify concerning the matters already disclosed in open court by his client. Any other rule would enable the client to use as a sword the protection which is awarded him as a shield. *Sovereign Camp, W. O. W., v. Grandon*, 64 Neb. 39; *Hunt v. Blackburn*, 131 U. S. 403.

3. The plaintiff Frank Cerny testified that, before the mortgages were made, he went to Omaha to see Mr. Pierce, the defendant's credit man, who substantially repeated the representations claimed to have been made by Mr. Rich on behalf of the defendant. The plaintiff was permitted to prove by another Cerny that, when Frank returned from Omaha, he talked with his father in the Bohemian language and told him that Mr. Pierce promised that, if the mortgages were given, the property would have to sell for not less than \$3,800, and that, if it did not bring that amount, the defendant would bid it in and put the plaintiff in as agent to work out the amount of the mortgage indebtedness, and then turn the remainder over to them.

The plaintiff submitted an instruction to the effect that, if Mr. Pierce requested Frank Cerny, a member of the firm of John Cerny & Son, to return from Omaha to the village of Dodge with Mr. Rich, attorney for defendant, and come to an understanding with John Cerny and have the mortgages executed by him, and that Frank Cerny made these statements and thereby procured John Cerny to consent to the execution of the said mortgages, the defendant would be estopped to deny the authority of Frank Cerny to make such statements, and would be bound by

the same, whether Mr. Pierce had authorized the making of the same or not. This is upon the theory that, if a creditor in seeking to secure the payment of a debt owing by the partnership asks one partner to consult with his copartner, he thereby makes the partner with whom he talks his agent, so that, if such partner makes false statements to his copartner, the creditor is bound by such false statements. The plaintiff in support of this proposition cites the case of *Wise v. Newatney*, 26 Neb. 88. In that case the estoppel was against the party who made the false representations, and it was very properly held that, where one by his words or conduct wilfully causes another to believe in any state of things and induces him to act on that belief so as to alter his own previous condition, the former is concluded from averring against the latter a different state of things. To have given the instruction asked would have enunciated a new and dangerous innovation in the law, and we think the court rightly refused the same.

4. The court gave an instruction in which the jury were told that the plaintiff must establish not only that the alleged promise was made, but that the same was made deceitfully with intent to defraud the plaintiff, and that in this case, in order for the promise or representation to be deceitfully made, it must appear that at the time of making the promise the defendant had no intention of complying with the same. The plaintiff complains that this charge imposed upon him too great a burden, and that it required him not only to prove that the defendant had no intention to perform the promise, but, in addition thereto, that the promise was deceitfully made. Assuming, for the purpose of this case, that, where an intention not to perform a promise is shown, that is sufficient evidence from which the jury may infer that the promise was fraudulently and deceitfully made, there is no error in his instruction, for it informs the jury that a want of intention to comply with the same is evidence that it was deceitfully made. The plaintiff was therefore given the

advantage of the most favorable construction of the rule in that respect.

5. In its instruction concerning the measure of damages, the court told the jury that, "in determining the market value of the stock, you will consider its value if sold in a lump or bulk, and not the price for which it might be sold at retail, and in no event will you fix the market value as exceeding \$3,800." One witness had testified that the market value of the goods at the village of Dodge was \$4,000, another \$4,500, while a third testified that he took an invoice, and that the market value of the goods in a going concern would be the invoice price, \$3,912.50, while their value if sold in bulk would be \$2,500. The plaintiff contends that the instruction referred to deprived him of all the above evidence except that of the witness who testified that the market value of the property if sold in bulk was \$2,500; and that it is inconsistent with the rule laid down in *Maul v. Drexel*, 55 Neb. 446, to the effect that the market value is not what the property is worth solely for the purpose to which it is devoted, but the highest price it will bring for any and all uses to which it is adapted and for which it is available. The charge complained of did not condition the value of the stock of goods upon any particular use, but dealt altogether with the manner in which it was to be sold. The mortgages authorized the sale in bulk, and such would be the natural and ordinary course. It could not be expected that the mortgagees should sell the same at retail and incur the expense necessarily involved. If the conditions surrounding the sale of a stock of goods are such as to attract purchasers who desire to continue the business in that location, they may frequently be worth their invoice price, or even more; but where the conduct of the business has been a failure, and no purchasers can be found who wish the same for the purpose of carrying on the business in that location, it is common knowledge that such a stock is worth much less. In either case the goods may be sold in bulk or as a whole, but the

Chicago, R. I. & P. R. Co. v. Erskine.

difference in their market value does not depend upon the manner of the sale. It is fixed by other and external conditions. We therefore conclude that the court did not err in instructing the jury that they were to consider what these goods were worth sold in bulk.

We recommend that the judgment of the district court be affirmed.

FAWCETT and ROOT, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY,
APPELLANT, V. HORATIO ENDELL ERSKINE, APPELLEE.

FILED DECEMBER 17, 1908. No. 15,379.

Adverse Possession: EVIDENCE. Plaintiff and defendant in ejectment claimed title from a common source. Defendant secured his title subsequent to the conveyance to plaintiff, but prior to the date plaintiff's deed was recorded. Defendant did not prove that his deeds or any of the conveyances in his chain of title subsequent to the deed to plaintiff had been recorded, nor prove the consideration paid by him therefor. As to one tract, he proved that for ten years next preceding the commencement of this suit a corn-crib had been built and maintained on said block by his grantors and himself, but did not prove that any other part of the block had been occupied by them, nor that said crib had not been built with plaintiff's permission. As to the other tract involved in the suit, defendant proved that it had been inclosed for more than ten years before the commencement of the suit, and occupied and used by different individuals during that time, but did not prove that he had succeeded to the possession of all of said occupants. *Held*, That the evidence did not sustain a judgment for defendant.

APPEAL from the district court for Lancaster county:
EDWARD P. HOLMES, JUDGE. *Reversed*.

Billingsley & Greene, M. A. Low, Paul E. Walker, Edward P. Holmes and G. L. De Lacy, for appellant.

Strode & Strode, contra.

Root, J.

Action in ejectment. Trial to the court, and judgment for defendant. Plaintiff appeals.

1. The land involved in this action is the greater part of block "A" and a strip 30 feet in width off of the north side of block "B," in Prairie Home. The parties claim title thereto from a common source, plaintiff by virtue of a deed executed in 1890 and recorded in 1904, and defendant by mesne conveyance to him, the earliest in his chain of title being dated 1891. So far as the record discloses, none of those conveyances were ever recorded, nor has defendant furnished any evidence concerning the consideration paid therefor or the circumstances under which any of them were executed. In addition to finding generally for defendant, the court found that he had been in the open, notorious and adverse possession of said real estate for more than ten years next preceding the commencement of this action. We do not think that the evidence sustains the finding of adverse possession. Block "A" is a triangular-shaped tract of land. The testimony tends to prove that defendant's grantor, a few weeks more than ten years preceding the commencement of this suit, constructed a corn-crib on said block and that said crib has been used as a store house for corn since that day. The evidence does not disclose what use was made of that part of the block not occupied by the crib, or who controlled it nor what claim of title, if any, was made thereto by defendant or his grantors. The entire tract has not been inclosed, and the evidence falls far short of proving adverse possession of the entire block. As to the 30-foot strip on the north side of block "B," the evidence is undisputed that this land has been inclosed since the fall of

Stewart v. Omaha & C. B. Street R. Co.

1892 or 1893; that the land has been used as a pasture part of said time and cultivated in some years. Different individuals are named as having used the land for pasture or cultivation, but the evidence fails to connect the possession of the occupants, or to show such a condition as would warrant a court in tacking the possession of the prior occupants to the possession of defendant. The burden was upon defendant to establish the defense of adverse possession. *Weeping Water v. Reed*, 21 Neb. 261.

2. Counsel for defendant argues that there was a mistake in the deed from the Foxes to plaintiff, and that those grantors only sold 100 feet in width of the land south of the center line of said railway. There are some circumstances shown by the evidence tending to support that theory, but a consideration of the entire record satisfies us that no such mistake was made.

Defendant may have a perfect defense to this action, but he has failed to establish it by the proof adduced. The judgment of the district court is therefore reversed and the cause remanded for further proceedings.

REVERSED.

ROBERT A. STEWART, APPELLANT, V. OMAHA & COUNCIL
BLUFFS STREET RAILWAY COMPANY, APPELLEE.

FILED DECEMBER 17, 1908. No. 15,390.

1. **Street Railways: NEGLIGENCE.** A street railway company is guilty of negligence if it fails to give proper warning of the approach of its cars to a public crossing, or if it operates such cars at an unusual and excessive speed at said point.
 2. ———: **STREET CROSSINGS: DUTY OF PEDESTRIANS.** A pedestrian about to cross the tracks of an electric street railway at a public crossing is not under a duty to observe the same degree of watchfulness and care as when attempting to cross an ordinary steam railway.
 3. ———: **CONTRIBUTORY NEGLIGENCE: QUESTION FOR JURY.** Defendant
- 10

Stewart v. Omaha & C. B. Street R. Co.

maintains a double-track street railway on Tenth street in Omaha. Cars north bound use the eastern track, and those south bound the western one. S., about 8 o'clock in the evening of a winter day, alighted west of the track from a south-bound car at a street crossing. S. was familiar with the manner in which defendant operated its cars on said streets. He waited for an instant, and glanced to the south, until said car had been propelled some 8 or 10 feet. Not seeing or hearing a north-bound car, he crossed the street without further looking or listening, and was run down on the eastern track by a north-bound car. The testimony tended to prove that said car was running at a speed of 20 miles an hour, and that no warning was given of its approach until within about 10 feet of Howard street, and almost at the instant of the collision with plaintiff. *Held*, That it was for the jury, and not the court, to determine whether plaintiff was guilty of contributory negligence. •

APPEAL from the district court for Douglas county:
GEORGE A. DAY, JUDGE. *Reversed*.

Brome & Burnett, for appellant.

John L. Webster and *W. J. Connell*, *contra*.

Root, C.

Action for damages because of the alleged negligent operation of a street car whereby plaintiff was injured. The trial judge directed a verdict for defendant, and plaintiff appeals.

Plaintiff's place of business, in January, 1904, was located at the southeast corner of the intersection of Tenth and Howard streets in the city of Omaha. Howard street runs east and west, Tenth street north and south. Each street is 100 feet in width, and Tenth street is on an up-grade toward the north. The sidewalks on each side of said streets are 20 feet in width. Defendant maintains and operates a double track street railway on Tenth street. North-bound cars run over the eastern track, and south-bound cars over the western line. The evidence does not accurately show the distance between said tracks, but approximately they are from two to four feet apart. De-

defendant's cars stop at the far crossings for the purpose of receiving and discharging passengers. The Union passenger depot and the Burlington station are located on Tenth street, south of Howard. Several of defendant's car lines converge on Tenth street, and its cars pass to and fro thereon at frequent and irregular intervals, so that any one familiar with the situation at said intersection might reasonably expect a car to pass said point at any time during the day or early evening. Plaintiff had resided in Omaha for some two years preceding the accident, and was familiar with all of the aforementioned facts. It was cold, but clear, the night of the accident, with some snow on the ground, and, with the aid of the lights maintained on the streets and in the adjacent buildings, one could discern objects for a considerable distance. Plaintiff was then about 52 years of age, and in the possession of good eyesight and hearing. Plaintiff had occasion to go to his office about 8 o'clock in the evening, and rode south on defendant's car on Tenth street to said intersection, and got off the car on the west side of the western track and about 8 feet south of the Howard street curb line. Giving plaintiff's own testimony and that of his witnesses the most favorable construction, it appears that, as he stepped down to the street from the car, he placed his hands in his pockets, turned, facing southeast, and looked south to ascertain whether a north-bound car was near at hand; that he remained in that attitude for an instant, during which time the south-bound car had moved about 10 feet; that he did not hear any signal or noise to indicate that a car was coming north on the eastern track, nor did he see such a car. He then walked directly east across the first track, over the space between the two lines of railway, and across the west rail of the east track, at which point he noticed the headlight of a north-bound street car about 20 feet distant, and running at the rate of 20 miles an hour. At just that instant the motorman rang the gong, and the car collided with him. Plaintiff was caught on the car fender and carried or

shoved some distance, and finally thrown onto the street about the middle of Howard, and the car was stopped so that the rear platform was parallel with his body as it laid in the street. Plaintiff admitted that he did not look south after he started to cross defendant's railway. There is no testimony in the record to corroborate plaintiff concerning the speed of the car, nor any evidence to indicate the distance that a car would move before it could be stopped if it was running at the rate of 20 miles an hour at said point. The record does not disclose any evidence of municipal regulations or rules of the defendant concerning the speed and methods of control of its cars, and but little to show the precautions taken by defendant's employees to warn the public at crossings of the approach of such cars. Plaintiff testified that the motorman in charge of the north-bound car did not ring the gong until the car was very close to him, and in this there is some slight corroboration from one other witness. Plaintiff further appeared to have been somewhat preoccupied at the time with the consideration of business of importance to himself, which he expected to transact at his office that evening. If from the foregoing state of facts we can say, as matter of law, that plaintiff was guilty of contributory negligence, the direction of the learned district judge was right, otherwise the judgment must be reversed.

A pedestrian traveling the streets of a city is not held to the same degree of care and watchfulness in crossing an electric road operated for local passenger traffic as he would be if crossing an ordinary railroad. In a qualified sense the rights of the railway company and that of the footman are equal in the use of the street, but consideration must be given the fact that cars are confined to a track and cannot be turned to either side; that street railway companies are permitted to use the streets for rapid transit and for the purpose of facilitating public travel, and that the speed of their cars cannot be checked instantly or within the same space of time as can the individual control his movements. The persons in control

of those cars, however, must be charged with notice of the fact that vehicles and footmen, especially at crossings, are constantly crossing the railway, and that there is danger that accidents will occur unless reasonable prudence is exercised in controlling the speed and giving notice of the oncoming of a car, under circumstances like those in the instant case. *Hall v. Ogden City Street R. Co.*, 13 Utah, 243, 57 Am. St. Rep. 726; *Marden v. Portsmouth, K. & Y. Street R. Co.*, 100 Me. 41, 109 Am. St. Rep. 476.

We are not oblivious to the fact that there is a tendency in the decisions of the courts of last resort in many of our sister states not to distinguish between the degree of care necessary to be observed by a footman in crossing the track of an electric street railway in the streets of a city and the caution he must exercise in walking over an ordinary steam railroad at a public crossing. A leading case sustaining that theory of the law, and one that has exerted as much influence as any decision upon said point is *Buzby v. Philadelphia Traction Co.*, 126 Pa. St. 559. In *Omaha Street R. Co. v. Loehneisen*, 40 Neb. 37, that decision was cited by counsel for the defendant, and rejected as unsound in principle by Mr. Commissioner IRVINE, who wrote the opinion of this court therein. The *Loehneisen* case is relied on by plaintiff as ruling the instant one, but there is so much disparity between the facts in the two cases that we consider it important, herein only to the extent that it announced the policy of this court not to follow the decisions in Massachusetts and Pennsylvania in cases like the one at bar. We think the better rule is that, although a pedestrian while about to cross a street railway track should generally look and listen for approaching cars, the rule is not inflexible, nor will the courts say as a matter of law that the footman is negligent under all circumstances if he fails to do so, nor ought any court to hold that such exercise of the traveler's faculties must be observed in every case at any particular point in his progress across the tracks. *Lincoln Traction Co. v. Brookover*, 77 Neb.

221, is cited as in point, but in that case plaintiff was driving a covered wagon, and attempted to cross the railway tracks, not at a street crossing, but midway of the block. There was nothing whatever, except the cover of his wagon, to obstruct his view, and it was apparent that he did not exercise the slightest caution for his own safety. In the instant case, giving plaintiff's testimony the utmost credence, he did stop and look and listen until the car upon which he had been riding had moved some distance from him. Ought a court to arbitrarily say just how long plaintiff should have remained in that attitude? We think not. If it can be said that a footman must stop and look and listen until all temporary obstructions between himself and an approaching car are removed, and then must profit by his senses so as to avoid impact with such car, then we can hardly imagine a case wherein defendant would be held liable for maiming a pedestrian. It would seem more consistent with that sound public policy which has regard for life and limb to hold that the foot traveler should be held only to such a degree of caution as may be reasonable under the circumstances of the particular case, and that, if he does thus exercise any care and caution, the sufficiency thereof should be left for the determination of the jury. There is some evidence in the record tending to prove that, at what is termed the Sixteenth street crossing, gongs on cars nearing that point are sounded continuously. Why not at the intersection of Howard and Tenth? The city of Omaha in the exercise of the police power delegated to it by the legislature might well have regulated the operation of street cars and have directed what signals and warnings shall be given as cars approach street intersections. If the city has not exercised this power, then the sufficiency of such warning and the speed at which a street car may be operated so as not to unnecessarily and negligently imperil pedestrians must be determined by the jury under proper instructions of the trial court in each case where those facts may be material and in issue.

We do not hold that, had this case been submitted to a jury and it had found for defendant, we would disturb such a verdict, because it is possible that fair-minded men might infer that plaintiff was guilty of contributory negligence in acting as he did. On the other hand, we further hold that said testimony, uncontradicted and unexplained, might support not only an inference that defendant was guilty of negligence in operating the car at a dangerous rate of speed that collided with plaintiff, and in failing to give sufficient notice of the approach thereof, but that plaintiff had exercised reasonable prudence in his conduct, and was not guilty of contributory negligence. In the state of the record, the issues should have been submitted for the consideration of the jury. *Chicago City R. Co. v. Robinson, Adm'x*, 127 Ill. 9, 11 Am. St. Rep. 87; *Chicago & J. E. R. Co. v. Wanic*, 230 Ill. 530; *Cincinnati Street R. Co. v. Snell*, 54 Ohio St. 197; *Driscoll v. Market Street C. R. Co.*, 97 Cal. 553, 33 Am. St. Rep. 203; *Bass v. Norfolk R. & L. Co.*, 100 Va. 1, 40 S. E. 100; *Spiking v. Consolidated R. & P. Co.*, 33 Utah, 313; *Nebraska Telephone Co. v. Jones*, 60 Neb. 396; *Omaha Street R. Co. v. Mathiesen*, 73 Neb. 820.

It is therefore recommended that the judgment of the district court be reversed and the cause remanded for further proceedings not inconsistent with this opinion.

FAWCETT and CALKINS, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

REVERSED.

CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY,
APPELLANT, v. HORATIO N. LATTI, APPELLEE.

FILED DECEMBER 17, 1908. No. 15,400.

Ejectment: EVIDENCE. Defendant in ejectment denied plaintiff's title and right of possession. On the trial plaintiff proved title to said land, and defendant failed in any manner to controvert the same. *Held*, That a judgment for defendant was not supported by the evidence.

APPEAL from the district court for Lancaster county:
EDWARD P. HOLMES, JUDGE. *Reversed.*

Billingsley & Greene, M. A. Low, Paul E. Walker, Edward P. Holmes and G. L. De Lucy, for appellant.

Strode & Strode, contra.

ROOT, J.

Ejectment to recover possession of a strip of land 300 feet in width. Defendant denied plaintiff's title and right of possession. He thereby admitted that he was in possession of said premises. This case was tried with three other like cases, and the evidence concerning the various tracts of land claimed by the several defendants is commingled and somewhat confused. So far as the defendant herein is concerned, the evidence is unsatisfactory, but we judge from the record and the briefs that defendant only claims title to lots 4, 5 and 6, in block 2, Prairie Home. No part of any of said lots is within the strip of land referred to in plaintiff's petition. Defendant admitted during the trial that title to said strip of land was originally in Charles and Herman Fox. A deed from the Foxes to plaintiff for said land was received in evidence, and we find nothing to deraign said title further, or to estop plaintiff from reclaiming said land as against this defendant.

The judgment is not sustained by the evidence, and is therefore reversed, and the cause remanded for further proceedings.

REVERSED.

G. B. WILLIAMS ET AL., APPELLANTS, V. FRANK C.
PHILLIPS, APPELLEE.

FILED DECEMBER 17, 1908. No. 15,406.

Intoxicating Liquors: LICENSE: SALES TO MINORS. Where on the hearing of a remonstrance against the granting of a liquor license it is satisfactorily proved that the applicant has within a year sold or given to a minor malt or spirituous liquors, he is not entitled to a license, and his application should be denied.

APPEAL from the district court for Dundy county:
ROBERT C. ORR, JUDGE. *Reversed with directions.*

R. D. Druliner and Perry & Lambe, for appellants.

Charles W. Meeker and David G. Hines, contra.

ROOT, C.

Appeal from a judgment of the district court for Dundy county affirming the action of the trustees of the village of Benkelman in granting a license to Frank C. Phillips to sell intoxicating liquors in said village. Remonstrants appeal.

The applicant, Phillips, filed his application for license in July, 1907. The remonstrants alleged that Phillips in the year preceding his application had violated the excise law in illegally selling intoxicating liquors, to wit, beer, to minors. The evidence discloses that in 1906 a license had been issued to one Palm to sell such liquors in Benkelman, and that Phillips had control of said business. It is undisputed that about the 21st day of August, 1906, two minors of the age of 17 years were sold or furnished beer in said saloon, and that Frank C. Phillips was present. On cross-examination the witness stated that the liquor was sold by a bartender; but even if that were material, there is nothing to show that Phillips was not that bartender. He testified in his own behalf, and did not give any testimony upon this point. We are of opinion that, in the state of the

Chicago, R. I. & P. R. Co. v. Welch.

record, Phillips is fairly chargeable with either selling the liquor or authorizing such sale. It is a misdemeanor for a licensed saloon-keeper to sell intoxicating liquors to a minor. Ann. St. 1907, sec. 7157. If the applicant has violated said section within the year preceding his application, he is not entitled to a license. *Livingston v. Corey*, 33 Neb. 366. All persons responsible for the commission of a misdemeanor are guilty as principals. *Wagner v. State*, 43 Neb. 1. Where intoxicating liquors are unlawfully sold by the agent of a saloon-keeper, the principal as well as the agent may be prosecuted. *Martin v. State*, 30 Neb. 507. The applicant had violated the liquor law, and the village trustees should not have issued a license to him. *In re Adamek*, 82 Neb. 448.

We therefore recommend that the judgment of the district court be reversed and the cause remanded, with instructions to reverse the findings of the village board.

FAWCETT and CALKINS, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded, with instructions to reverse the findings of the village board.

REVERSED.

CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY,
APPELLANT, v. JAMES H. WELCH, APPELLEE.

FILED DECEMBER 17, 1908. No. 15,429.

1. Vendor and Purchaser: BONA FIDE PURCHASER: DEEDS: RECORDING.

In 1890 plaintiff purchased a tract of land 100 feet in width on the north side, and 200 feet on the south side, of the center line of its proposed railway, but did not record its deed until January, 1904. It constructed and operated said railway in 1890. Shortly subsequent to the making of said deed the grantors therein laid out a town site, and platted the land south of the tract thus sold to plaintiff, so as to overlap plaintiff's land 100 feet. This plat

was duly recorded in 1891. Plaintiff has operated a line of railway since 1890 over said tract of real estate. The land in dispute was sold to defendant in 1891, and is located more than 100, but less than 200, feet from the center line of plaintiff's railway. Defendant thereafter immediately constructed buildings upon the parcel of land purchased by him, and has had actual and continuous possession thereof ever since. Defendant recorded his deed in 1891. At no time preceding the service of notice on defendant to quit said land did plaintiff perform any visible act, other than to operate its railway, to indicate that it claimed any land south of a line 100 feet south of its railway. *Held*, That, under the recording act, defendant was protected in his title to said real estate.

2. **Ejectment: DENIAL OF TITLE.** In ejectment, if defendant denies plaintiff's title, he may prove any defense that will defeat the action.

APPEAL from the district court for Lancaster county:
EDWARD P. HOLMES, JUDGE. *Affirmed.*

*Billingsley & Greene, M. A. Low, Paul E. Walker,
Edward P. Holmes and G. L. De Lacy, for appellant.*

Strode & Strode, contra.

Root, J.

In 1890 Charles and Herman Fox owned in fee simple a tract of land in Lancaster county, Nebraska, over which plaintiff had surveyed and staked the route for its railway. On the 23d day of September, 1890, said landowners sold and conveyed to plaintiff a strip of land of varying width along said route being 150 feet for a distance, 200 feet wide between other points, and 300 feet in width where the land in dispute herein is situated, of which 200 feet is south of the center of said railway. Said deed was not recorded until in January, 1904. In November, 1890, the said Herman and Charles Fox platted a village on the land owned by them south of said railway, and designated it "Prairie Home." This plat was filed February 21, 1891, and overlapped the description in the deed to the railway company so that a strip of land 100 feet in width sold by

Chicago, R. I. & P. R. Co. v. Welch.

the Foxes to plaintiff was also included in said plat. On the northern boundary of the land thus platted a highway was dedicated to the public, and next south thereof is the tier of blocks some part whereof is in dispute in this action. Defendant purchased lots 9 and 10, in block 2, Prairie Home, from Charles and Herman Fox on the 14th day of February, 1891, and his conveyance was duly recorded February 25, 1891. Welch constructed a building on said lots, and has occupied it thence hitherto. Welch paid the taxes on said lots since he acquired title thereto, and plaintiff has at all times paid taxes levied upon its right of way. Plaintiff has never taken actual possession of the said strip of land, but its fence on the south side of its railway, so far as built, and its use of the land at said point, has been confined to a strip of land 100 feet in width. In December, 1904, plaintiff brought this action to secure possession of so much of said land as is situated within defendant's inclosure. Defendant answered, denying plaintiff's title and right of possession. There was a trial to the court, and judgment for defendant. Plaintiff appeals.

The briefs of counsel contain a learned and instructive argument relative to the law of adverse possession as applied to a railroad right of way, but we do not consider that subject an important one in the instant case. Plaintiff did not acquire the land in dispute by condemnation proceedings, but by warranty deed. It thereby acquired a fee simple title thereto. *Hull v. Kansas City & O. R. Co.*, 70 Neb. 756. Part of the consideration for said deed was a promise that plaintiff should construct a depot within certain described bounds, and it was provided that, in case there should be a change in the use of said building or it should be removed or abandoned, the real estate should revert to the grantors. This condition did not limit the estate conveyed to a mere easement, although the condition may be enforced if circumstances warrant. *Jetter v. Lyon*, 70 Neb. 429. There is nothing in the record to suggest that defendant was not a *bona fide* purchaser, and

what little evidence there may be on this subject points to the conclusion that he comes within that designation.

Section 10816, Ann. St. 1907, provides: "All deeds, mortgages, and other instruments of writing which are required to be recorded shall take effect and be in force from and after the time of delivering the same to the register of deeds for record, and not before, as to all creditors and subsequent purchasers in good faith without notice; and all such deeds, mortgages, and other instruments shall be adjudged void as to all such creditors and subsequent purchasers without notice whose deeds, mortgages or other instruments shall be first recorded; provided, that such deeds, mortgages, and instruments shall be valid between the parties." Defendant is plainly within the protection of this statute, unless plaintiff is correct in its argument that, as it appeared from the admission of defendant that plaintiff had operated a line of commercial railway continuously since in 1890 over its track on the 200-foot strip of land adjacent to the real estate in dispute, such possession was notice to the world of its rights to the limits of its grant. Many authorities may be cited to sustain the proposition that, where a railway by its charter or the law itself is limited to a certain width of right of way its possession of any part thereof for railway purposes will be notice to the world of its title to all of its right of way at said point but those authorities are not pertinent in the instant case. A railway in Nebraska is only permitted to condemn a right of way 100 feet in width on each side of the center of its track, except a greater amount may be needed for depot grounds, wood or water stations, or for embankments, excavations, or the depositing of waste earth excavated in the construction of the railway. The extra strip of land in the instant case was not needed for any of said purposes. The plaintiff did not at any time take actual possession of any part thereof or exercise any control over it, but its entire conduct was consistent with Foxes' ownership thereof and right to sell and convey the same. There was nothing to

Chicago, R. I. & P. R. Co. v. Welch.

indicate that plaintiff had acquired, by deed or condemnation, ownership to, or an easement in, more than 100 feet in width of the land south of its railway. The land in question was separated from this strip by a public highway, and the record fails to disclose any affirmative act of plaintiff, prior to service of notice just before this suit was commenced, that would suggest to any person that it had any interest in the land in litigation in this action. We think that this case comes within the reasoning of Mr. Justice SEDGWICK in *Millard v. Wegner*, 68 Neb. 574, and that, because of plaintiff's failure to record its deed or to perform any visible act to warn purchasers that it owned the land involved in this action, defendant should prevail.

The judgment of the district court is therefore

AFFIRMED.

CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY,
APPELLANT, v. HARRIET WELCH, APPELLEE.

FILED DECEMBER 17, 1908. No. 15,344.

APPEAL from the district court for Lancaster county:
EDWARD P. HOLMES, JUDGE. *Affirmed.*

*Billingsley & Greene, M. A. Low, Paul E. Walker,
Edward P. Holmes and G. L. De Lacy, for appellant.*

Strode & Strode, contra.

ROOT, J.

The parties to this action claim title from a common grantor, and this controversy involves much the same facts as those recited in the case of *Chicago, R. I. & P. R. Co. v. Welch*, ante, p. 106. The only difference in the cases is that after the village of Prairie Home was platted, and in March, 1892, the Foxes agreed in writing to convey all of their title to the then unsold lots in said village and

Rohrer v. Hastings Brewing Co.

the land adjacent thereto which they then owned, provided they were paid some \$5,000 according to the terms of said contract. This contract was foreclosed, and by virtue of a sheriff's deed and mesne conveyances title to the land in dispute in this action vested in defendant Harriet Welch. The contract recited "subject, however, to the easement of said railroad in its right of way." Defendant's deed was executed June 16, 1900, and recorded June 23 of said year, and she has occupied said premises since that date.

It is suggested that the recital in the contract from the Foxes to Erskine was sufficient notice to defendant of plaintiff's unrecorded deed. Had the Foxes conveyed by quitclaim deed, the grantee would have been protected in the circumstances of this case if a *bona fide* purchaser. *Schott v. Dosh*, 49 Neb. 187, 195. Defendant's rights are as secure under the contract referred to. Defendant has not been diligent in disclosing the circumstances surrounding the making of the deed to herself nor the consideration paid, but, after an inspection of the entire record, we feel justified in dealing with this case as if said defendant was a *bona fide* purchaser of said lots.

For the reasons stated in *Chicago, R. I. & P. R. Co. v. Welch*, ante, p. 106, heretofore referred to, as well as for those herein stated, the judgment of the district court was right and will be

AFFIRMED.

W. S. ROHRER, APPELLANT, V. HASTINGS BREWING COMPANY, APPELLEE.

FILED DECEMBER 17, 1908. No. 15,704.

- . **Cities: LIQUOR LICENSES: WHEN MAYOR MAY VOTE.** The mayor in cities of the second class having more than 5,000 and less than 25,000 inhabitants has the right to cast a deciding vote in a contest over an application for a liquor license in case of a tie vote of the council.

Rohrer v. Hastings Brewing Co.

2. **Statutes in Pari Materia.** Chapter 82, laws 1907, which prohibits corporations from being interested in any manner in the retail traffic in intoxicating liquors, is *in pari materia* with the Slocumb law (Comp. St. 1907, ch. 50).
3. ———. All statutes *in pari materia* must be taken together and treated as having formed in the minds of the enacting body parts of a connected whole, though considered at different dates.
4. **Statutes: CONSTRUCTION.** Long-continued practical construction of a statute by the officers charged by law with its enforcement is entitled to considerable weight in interpreting that law.
5. **Intoxicating Liquors: LICENSE: CORPORATIONS.** A corporation may lawfully receive a license to vend at wholesale intoxicating liquors in Nebraska, but no such authority exists for licensing a corporation to engage in the retail traffic in such liquors.

APPEAL from the district court for Adams county:
GEORGE F. CORCORAN, JUDGE. *Affirmed.*

J. W. James and R. A. Batty, for appellant.

Tibbets, Morey & Fuller and W. F. Button, contra.

*John C. Cowin, L. D. Holmes, Isidor Ziegler and Rich,
O'Neill & Gilbert, amici curiæ.*

Root, C.

Hastings is a city of the second class having more than 5,000 and less than 25,000 inhabitants. The Hastings Brewing Company is a local corporation, and in April of this year it applied to the council of said city for license to vend intoxicating liquors. The petitioners alleged "that said company and its officers are all of respectable character and standing and *bona fide* residents of said city and state." Defendant filed objections to the granting of said license, but, upon the hearing before the council, stipulated with the applicant that all of the objections specified in the remonstrance should be waived, except the following: "Under the laws of the state and the ordinances of the city, can a liquor license be legally issued to a corporation?" Remonstrant also reserved the right to

deny the authority of the mayor to cast a deciding vote in case of a tie vote of the council in said proceedings. Four councilmen voted "aye" and four "nay" upon every motion relating to said remonstrance and application, and in each instance the mayor voted in favor of the applicant; and thereby a license was issued to it. Upon appeal to the district court the action of the excise board was affirmed, and remonstrant appeals.

1. If the mayor did not have authority to vote upon the remonstrance and the application the license issued is void. Section 7175, Ann. St. 1907, provides: "The corporate authorities of all cities and villages shall have power to license, regulate and prohibit the selling or giving away of any intoxicating, malt, spirituous and vinous, mixed or fermented liquors within the limits of such city or village," etc. In *State v. Andrews*, 11 Neb. 523, we held that "the corporate authorities" were the mayor and council, and that, until those officers, by ordinance duly passed, provided for the licensing of said traffic, a permit could not be issued to vend intoxicating liquors within the limits of any municipality. In *Martin v. State*, 23 Neb. 372, we further held that the statute would be satisfied by the enactment of a general ordinance concerning said traffic, and that thereafter the authorities might act by resolution. Section 8518, Ann. St. 1907, provides: "The mayor shall preside at all the meetings of the city council, and shall have a casting vote when the council is equally divided, except as otherwise herein provided, and none other." Section 8519 directs that "the mayor shall have the power to approve or veto any ordinance passed by the city council, and to approve or veto any order, by-law, resolution, award of or vote to enter into any contract, or the allowance of any claim," with the further provision that the council may pass by an affirmative vote of two-thirds of all the members elected to the council any of said measures thus vetoed. Section 8533 enacts: "On the passage or adoption of every resolution or order to enter

into a contract, or accepting of work done under contract, by the mayor or council, the yeas and nays shall be called and entered upon the record, and to pass, or adopt any by-laws, ordinance, or any such resolution, or order, a concurrence of a majority of the whole number of the members elected to the council shall be required." Section 8536 also provides that all ordinances or resolutions for the appropriation of money shall require for their passage or adoption the concurrence of a majority of all members elected to the council. It would seem from an inspection of the statutes cited that it requires an affirmative vote of a majority of all of the councilmen of the city of Hastings to appropriate or expend its money, or to execute a contract in the name of said municipality; that the mayor may veto any general ordinance passed by the council, or that he may veto any resolution, ordinance or by-law passed by the council to create a liability against said city or to expend its funds; and that in such cases two-thirds of all the members elected to said council may pass any such measures over the mayor's veto. As to every other act of the council, except the passage of ordinances, the mayor may vote in case of a tie vote of the councilmen. The passage of a resolution overruling a remonstrance to an application for a liquor license, or granting such license, does not come within any of the exceptions direct or implied in the statute, and therefore the mayor had authority to cast the deciding vote.

2. The next question is whether, under any circumstances, a corporation may be licensed to sell intoxicating liquors in Nebraska. This traffic is not a right or privilege guaranteed or protected under the constitution of the United States or the constitution of the state. *Bartemeyer v. Iowa*, 18 Wall. (U. S.) 129; *Beer Co. v. Massachusetts*, 97 U. S. 25; *Crowley v. Christensen*, 137 U. S. 86; *Mette v. McGuckin*, 18 Neb. 323. The legislature may, therefore, entirely prohibit that traffic, or select natural, to the exclusion of artificial, persons as licensees. We have repeatedly held that the Nebraska liquor law is prohibitive

as to all persons not within its exceptions. *Brown v. State*, 9 Neb. 189; *Pleuler v. State*, 11 Neb. 547; *State v. Cummings*, 17 Neb. 311; *Martin v. State*, 23 Neb. 371.

Is a corporation within those exceptions? The statutes now in force concerning said traffic are the result of evolution and slow growth. The territorial legislature in 1855 prohibited the manufacture or disposition of intoxicating liquors as a beverage (act March 16, 1855; laws 1855, p. 158), and the criminal code made it unlawful to furnish such liquors to Indians or intoxicated persons. The act of November 4, 1858 (laws 1858, pp. 256-260), clothed county commissioners and the authorities of incorporated towns and cities with power to license said commerce upon condition that the applicant for license comply with certain stipulations, one of which was that at least ten freeholders of the township wherein the applicant resided should file with the county clerk a petition to the effect that said applicant was "a man of respectable character and standing, and a resident of the territory." This act was included in the criminal code of the revised statutes of 1866 as chapter 29 thereof. A few sections were added in said revision; but, with one or two immaterial changes in composition, chapter 29 aforesaid is a copy of the act of November 4, 1858. In 1873 chapter 29, *supra*, was carried into the general statutes as chapter 58, secs. 572-590, thereof. The Slocumb law of 1881 (Comp. St. 1881, ch. 50) is a consolidation of the laws theretofore enacted, with some additions to meet possible deficiencies that may have developed in the administration of the law. Sections 7150, 7159, 7160, 7161, 7165, 7166, 7167, 7168, Ann. St. 1907, reproduce, in some instances in identical language, the text of sections 572, 574, 575, 576, 577, 578, 579, 581, ch. 58, Gen. St. 1873, being part of the criminal code thereof. Sections 7150, 7152, 7153, and 7156, Ann. St., 1907, are to all intents the same as sections 1, 2, 3 and 4, act February 25, 1875 (laws 1875, p. 24), relating to intoxicating liquors. Preceding the enactment of the Slocumb law the excise board might ac-

cept a bond of \$500 and a license fee of \$25. The vendor's liability and that of his bondsmen was to respond to the damages accruing because of his *retail* traffic. This distinction was eliminated in 1881, making the bondsmen liable for all damages growing out of said traffic. The penalty in the bond was fixed at \$5,000, and the license fee at not less than \$500. Thereby it seems to us that the legislature intended to restrict and safeguard the wholesale as well as the retail traffic in such liquors. In 1885, in *State v. Cummings*, 17 Neb. 311, we issued a writ to the city marshal of Omaha compelling him to enforce the Slocumb law against the wholesale liquor dealers in said city, some of whom, we are of opinion, appeared to have been corporations. We think that we may take judicial notice of the fact that at the time of the enactment of the Slocumb law corporations were, and continuously thereafter have been, engaged in the business of manufacturing malt and spirituous liquors in Nebraska, and selling the same at wholesale. So far as we are advised, the administrative officers and those officials in the state whose duty it has been to enforce the liquor laws have generally considered corporations eligible to engage in such wholesale business. The conduct of those officials is entitled to some consideration in interpreting the statute. *State v. Holcomb*, 46 Neb. 88; *State v. Sheldon*, 78 Neb. 552; *State v. Sheldon*, 79 Neb. 455. We do not believe that it was the policy or intention of the legislature to destroy the business of those corporations, while permitting individuals to engage therein; and if, considering all of the legislation upon this subject, there is a reasonable distinction between the retail and wholesale business of selling said liquors, and the various acts upon said subject warrant the conclusion that a corporation may lawfully receive a license to sell said liquors at wholesale, although not at retail, we ought not at this late day to reverse a construction given said statutes for almost a generation past.

In 1907 the legislature enacted the "Gibson Act" section 7194, Ann. St., which prohibits every person or "corpora-

tion" engaged in the manufacture of malt, spirituous or vinous liquors, or in the wholesale traffic thereof, from being in any manner interested in the business of retailing such liquors.. This act is in terms supplemental to the Slocumb law, and receives its vitality from the title of the earlier act. While this statute does not specifically authorize a corporation to engage in the wholesale traffic in such liquors, it by implication recognizes that such business does exist. The Slocumb law and the Gibson act are clearly *in pari materia*, and they must be considered together and treated as having formed in the minds of the enacting body parts of a connected whole, though considered at different dates. 2 Sutherland (Lewis), Statutory Construction (2d ed.), sec. 448; *Chicago, R. I. & P. R. Co. v. Zernecké*, 59 Neb. 689.

We must further presume that the legislature intended every provision of the statute to have a meaning. *Ford v. State*, 79 Neb. 309. To construe the statute as contended for by remonstrant we must eliminate the word "corporation" therefrom, and counsel recognize that fact by suggesting that the word was used inadvertently by the legislature; but we cannot so hold from an inspection thereof, or from any history within our knowledge of the various acts on the subject of intoxicating liquors. Counsel argue with great force that character is an attribute of a natural person, and that it cannot attach to an artificial one. We are of opinion that in a qualified sense aggregations of individuals may have a character; that the term may be applied intelligently to a community and to a corporation; that the specific acts of the individual members may be so identified with the greater whole as to give to the collection a character. It has been quite generally held that to rebut testimony to the effect that an applicant for a saloon license was a man of respectable character and standing, specific acts might be shown to prove his unfitness, as that he has violated the excise law, or maintained a gambling resort, or has committed any other act in violation of law, or repugnant to the moral sense of the community. *Stock-*

Rohrer v. Hastings Brewing Co.

well v. Brant, 97 Ind. 474; *Hardesty v. Hine*, 135 Ind. 72; *Whissen v. Furth*, 73 Ark. 366, 84 S. W. 500; *Groscop v. Rainier*, 111 Ind. 361; *Watkins v. Grieser*, 11 Okla. 302, 66 Pac. 333. Corporations may be prosecuted under the criminal law in Nebraska, and, although the corporation cannot be confined within prison walls, it may be fined, and, as all of its acts must be performed by natural persons, those individuals would also be subject to prosecution for violations of the excise law, even though they acted in the name of the corporation. An opportunity, therefore, would be presented for double punishment, to fine both principal and agent, with the possibility of imprisonment for the latter. *Enterprise Brewing Co. v. Grime*, 173 Mass. 252; *Overland Cotton Mill Co. v. People*, 32 Colo. 263; 105 Am. St. Rep. 74; *Southern Express Co. v. State*, 1 Ga. App. 700, 58 S. E. 67; *Stewart v. Waterloo Turn Verein*, 71 Ia. 226, 60 Am. Rep. 786.

State Electro-Medical Institute v. State, 74 Neb. 40, is cited as sustaining the proposition that a corporation may not be licensed to transact business. It is true that we said in said case concerning a physician's license that the qualifications of a medical practitioner are personal to himself, and that a corporation could not possess them. But the wholesale traffic in intoxicating liquors is commercial in its nature. *Enterprise Brewing Co. v. Grime*, *supra*; *People v. Heidelberg Garden Co.*, 233 Ill. 290. The retailer of strong drinks occupies a different relation to the public and said traffic than does the wholesaler. He is presumed to exercise personal control, either by himself or that of his servants under his personal supervision, of the distribution of said liquors to the consumer. The temptation to sell his goods to minors, Indians or intoxicated individuals, to adulterate his liquors, and dispose of them on Sundays and on election days, is ever present. It was the purpose of the legislature to restrict that traffic to respectable men of good character, who would obey the law, rather than the promptings of avarice in conducting said business. We are of opinion that the

legislature did not intend that a corporation or joint association should be permitted to enjoy the privileges of a license to sell intoxicating liquors at retail in Nebraska.

The record in this case is meager, but we infer therefrom, and from the argument of counsel, that the brewing company was not licensed to engage in the retail traffic in intoxicating liquors. If we were not thus satisfied, we would reverse this case and instruct the district court to cancel said license. Nor would that license, if uncanceled, shield said corporation from prosecution if it attempted to engage in said retail traffic.

After a careful and deliberate consideration of all of the legislative acts concerning said traffic and the conduct of the various officers whose duty it has been for the past 20 years to enforce those laws, we conclude that a corporation may be licensed to sell intoxicating liquors at wholesale in Nebraska. We therefore recommend that the judgment of the district court be affirmed.

FAWCETT and CALKINS, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

LEWIS E. POWELL, APPELLEE, V. ALICE MORRILL ET AL.,
APPELLANTS.

FILED DECEMBER 17, 1908. No. 15,839.

1. **Intoxicating Liquors: PETITION FOR LICENSE: FREEHOLDERS.** Under section 25, ch. 50, Comp. St. 1907, the freeholders required as signers of the petition for a license to sell intoxicating liquors must be *bona fide* freeholders, and not such as were made freeholders merely for the purpose of enabling them to sign the petition.
2. ———: ———. The wife of an applicant for a liquor license, even though she may be a freeholder, is not a qualified petitioner within the meaning of the liquor law.

Powell v. Morrill.

3. **Witnesses: CROSS-EXAMINATION.** Where a witness on his direct examination testifies that an applicant for a liquor license is a man of respectable character and standing in the community, it is competent to interrogate said witness on cross-examination concerning specific acts of the applicant, as that he has violated the excise law, or committed any other act in violation of law or repugnant to the moral sense of the community.
4. **Appeal: OFFER OF PROOF.** A formal offer to prove is not necessary to obtain a review of the ruling of the excise board in excluding an answer to a proper question propounded on the cross-examination of a witness.

APPEAL from the district court for Merrick county:
CONRAD HOLLENBECK, JUDGE. *Reversed with directions.*

Patterson & Patterson and Martin & Ayres, for appellants.

Harrison & Prince, contra.

ROOT, C.

Appeal from a judgment of the district court for Merrick county affirming an order of the village board of Chapman granting license to Lewis E. Powell to vend intoxicating liquors in said village. Remonstrants appeal.

1. Thirty-two individuals signed Powell's petition. It is not alleged in the petition or claimed by any party to this record that there are less than 60 resident freeholders in said village, and, therefore, if three or more of the said petitioners were not qualified to petition for said license, it should not have been issued. It is evident that there is a sharp division of sentiment in Chapman concerning the liquor traffic, and that applicants experience some difficulty in securing the 30 freeholders essential to vest the village trustees with power to issue such license. John Voberill and wife, Anna, are challenged as not qualified petitioners. About three days before they signed said petition the applicant procured a deed for one vacant lot for them from one Hugo Nissen. The lot had been deeded gratuitously to Nissen about a year preceding his convey-

ance to the Voberills, and he had thereupon signed a petition for a liquor license. Nissen testified that Powell came to him and requested a conveyance to the Voberills jointly so that he could secure two more signers upon his petition; that he received no consideration for the transaction or lot except that he was told to sign his name across the back of a note, but that he did not see the face thereof. The proof does not inform us what became of that document. Voberill claims to have purchased *bona fide*, and Powell denies Nissen's testimony, but there are many circumstances tending to corroborate Nissen, and the board refused to permit the notary who was present with Powell when the deed was made to answer questions concerning the transaction. Voberill claims to own other property in McCormick's addition to said village, but his testimony is too indefinite on this point to establish that fact. We held in *Dye v. Raser*, 79 Neb. 149, that said addition to Chapman was laid out and maintained in the interest of the liquor traffic and for the sole purpose of furnishing lots for colorable freeholders to sign petitions like the one in the instant case. Mrs. Voberill was not called as a witness, and there is nothing to show that she claims any interest under this deed or knows of its existence. The Voberills were not competent petitioners under the rule announced in *Bennett v. Otto*, 68 Neb. 652; *Colglazier v. McClary & Martin*, 5 Neb. (Unof.) 332; *Dye v. Raser*, *supra*.

2. Mrs. Minnie Powell, wife of the applicant, also signed his petition. Her freehold title is evidenced by a joint deed to herself and husband for a vacant lot. This conveyance was executed in 1906, and immediately thereafter she and her husband signed a brother-in-law's petition for a saloon license. She did not pay any consideration for the lot, nor did she testify as a witness. For all the record discloses she never claimed title to the real estate. It is not every resident freeholder that is qualified to sign a petition for a saloon license. The persons so authorized by statute are charged in a degree with a duty toward the

public. The signer is presumed to consult not only his individual inclination, but the rights and interests of third persons and of the general public in that community: We held in *Thompson v. Eagan*, 70 Neb. 169, that an infant could not sign such an application, and in *People v. Griesbach*, 211 Ill. 35, said case was approved. In *Doane v. Chicago City R. Co.*, 160 Ill. 22, it was held that abutting property owners who were paid to give their consent to the operation of a railway in the street adjacent to their property were incompetent to give that assent; that such owners occupied a position of trust toward the public; that sound public policy required them to exercise that trust with consideration for the public welfare, and that their interest, induced by the payment of money, disqualified them in that regard. In *Theurer v. People*, 211 Ill. 296, it was held that a lease for a building conditioned upon the lessee receiving a dram shop license disqualified the lessor from assenting to such license. Although the legislature has emancipated married women in many particulars, still there is, and from the nature of their relation must always be, a very considerable identity of interest between husband and wife regarding all the husband's business ventures. The wife in signing her husband's petition to engage in business would not consider public interests as against her husband's desire for gain and her desire for support for herself and family, nor could she be used as a witness against him. We are of opinion that Minnie Powell was disqualified to sign the petition under consideration.

3. Various witnesses testified to the respectable character and standing of the applicant. Counsel on cross-examination sought to prove by them that in 1906 and 1907 Powell as bartender had sold intoxicating liquors to an habitual drunkard. While a sale in 1906 might not have absolutely disqualified Powell from receiving a license in 1908, it was pertinent as tending to show that he was not of respectable character and standing. *Stockwell v. Brant*, 97 Ind. 474; *Hardesty v. Hinc*, 135 Ind. 72; *Whissen v.*

Furth, 73 Ark. 366, 84 S. W. 500; *Watkins v. Grieser*, 11 Okla. 302, 66 Pac. 333. Learned counsel for the petitioner assert that, as no offer was made to prove, any error that was committed in refusing to permit the witness to answer was waived, and cite *Seele v. Phelps*, 81 Neb. 690. It will be noticed that in the cited case remonstrants' own witnesses were refused permission to give testimony on direct examination. The case is in harmony with the numerous decisions of this court. *Masters v. Marsh*, 19 Neb. 458; *Connelly v. Edgerton*, 22 Neb. 82; *Wittenberg v. Mollayneaux*, 60 Neb. 583. On cross-examination the rule is different, and to enforce the same rule as in the direct examination of a witness would often defeat the very end of cross-examination. *Burt v. State*, 23 Ohio St. 394; *Martin v. Elden*, 32 Ohio St. 282; *O'Donnell v. Segar*, 25 Mich. 367; *Harness v. State*, 57 Ind. 1; *Hyland v. Milner*, 99 Ind. 398; *Cunningham v. Austin N. W. R. Co.*, 88 Tex. 534, 31 S. W. 629. Although a court, and necessarily the village board, would have considerable discretion in limiting cross-examination, it was certainly error to exclude testimony which, if true, would destroy the conclusion of the witness that the applicant was of respectable character and standing. The case is within the reasoning in *Steinkraus v. Hurlbert*, 20 Neb. 519; *Hollembaek v. Drake*, 37 Neb. 680.

It is therefore recommended that the judgment of the district court be reversed, with directions to cancel the license issued by the village board.

FAWCETT, C., concurs.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed, with directions to cancel the license issued by the village board.

REVERSED.

F. W. FITCH, APPELLEE, v. EUCLID MARTIN, ADMINISTRATOR, APPELLANT.*

FILED DECEMBER 17, 1908. No. 15,865.

1. **Witnesses: EVIDENCE: TRANSACTIONS WITH A DECEDENT.** If a claimant in support of his account against the estate of a deceased person testifies concerning independent acts performed by him, and as to which the deceased did not personally participate, he must furnish other and competent evidence connecting those acts with the subject of his demand, or his evidence will be stricken from the case. And, in giving that testimony, it is not proper for his counsel to interrogate claimant on the assumption that such services were performed for the deceased.
2. ———: ———: ———. F., a claimant against the estate of M., testified to the examination of the records of title to real estate, and refreshed his memory by referring to diaries kept by himself. He was cross-examined concerning certain of those entries, whereupon the court over defendant's objections permitted plaintiff to introduce in evidence not only the entries referred to in his cross-examination, but also those parts of the diaries relating to other and distinct alleged transactions with M. *Held, Error.*
3. **Executors and Administrators: CLAIMS: APPEAL: PLEADING: CONSTRUCTION.** If objections are interposed in the county court to the allowance of a claim against the estate of a deceased person, the issues thus framed will be construed with great liberality in the district court.
4. **Pleading: CONSTRUCTION.** A plea of general settlement and payment of all claims and demands is not an implied admission that any specific cause of action existed in plaintiff's favor and against defendant during the time covered by that settlement, and is not inconsistent with a general denial.

APPEAL from the district court for Douglas county:
ABRAHAM L. SUTTON, JUDGE. *Reversed.*

McGilton & Gaines, for appellant.

A. S. Churchill and Byron G. Burbank, contra.

ROOT, J.

This is the third appearance of this case in our court.
A sufficient statement of facts may be found in the opinion.

* Rehearing denied. See opinion, 84 Neb. —.

ion of Judge LETTON, 74 Neb. 538. Upon the last trial some additional evidence was produced by both plaintiff and defendant. The jury returned a verdict in favor of plaintiff for \$1,426.92, and defendant appeals. Plaintiff prosecutes a cross-appeal.

1. Defendant argues that the evidence is so overwhelming that plaintiff's claim is spurious that the judgment should be reversed and the cause ordered dismissed. While there is much that is unsatisfactory in the evidence adduced, there is also evidence to support plaintiff's claim. It would extend this opinion without profit to summarize the evidence pro and con, but we have considered it carefully, and remain of the opinion that a jury, and not the court, should say which of the many witnesses testifying are entitled to credit, and find accordingly.

2. Plaintiff as a witness in his own behalf was interrogated: "Q. You may state what services you rendered to Robert Major from October, 1893, down to the time of his death on September 13, 1902?" (Time covered by alleged contract for services.) Defendant objected as involving matters of personal transactions with the deceased, and the court ruled: "The witness may answer excluding all conversations and all transactions with Robert Major, the deceased." The witness then testified to numerous examinations of the records to ascertain titles to various tracts and lots of land and to performing other services. In some instances other evidence tended to support an inference that plaintiff probably was thus acting in the interests of Major, but many of the transactions, as we understand the record, were not thus connected with the deceased. At the close of the evidence defendant moved to strike out and exclude from the jury the greater part of plaintiff's testimony concerning the services performed, for the alleged reason that he had failed by evidence other than his own testimony to connect Major therewith. A separate motion was directed against each transaction testified to, and all the motions were overruled. We are of opinion that the learned district judge erred. All of said motions

Fitch v. Martin.

should not have been sustained, but in many instances they should have been.

As to the admissibility of the testimony, plaintiff relies on our former opinion in 74 Neb. 538, but it does not support his contention. The question first asked, and quoted in full, is based on the assumption that the services inquired about were rendered for Major. By overruling the objection thereto, although the witness was cautioned that he must not relate conversations or personal transactions with Major, the court still permitted the answer, and those that followed, to go to the jury as referring to work performed for the deceased, and that was the very crux of the case. The opinion of Judge LETTON merely suggests that a plaintiff may testify to what he has done, providing it does not involve a personal transaction with the deceased, and then, if he can connect those services with the deceased by other and competent evidence, his testimony, if relevant and otherwise competent, may go to the jury. But he does not state, nor is it the law, that the question may be propounded in such form that an answer thereto, while ostensibly excluding the deceased therefrom, still carries with it the inference that the services were performed for the deceased. To so hold would emasculate section 329 of the code. There is no such exception in the statute, and we are not authorized to enlarge its scope. *Kroh v. Heins*, 48 Neb. 691. Independent of this vice, which tainted said testimony, the evidence should not have been retained in the record unless some other competent evidence, whether introduced by plaintiff or defendant, tended to connect Major with those transactions. Many were not thus connected and to that extent defendant's motion at the close of the evidence should have been sustained. 1 Elliott, Evidence, secs. 191, 192; *People v. Millard*, 53 Mich. 63; *Huckins v. Kapf*, 14 S. W. (Tex. App.) 1016.

3. Plaintiff in testifying to said transactions refreshed his memory by examining entries that he claims to have made in private diaries in the years 1893 to 1902. As to

many of those entries the witness was cross-examined, but not as to all of them. Over the objections of defendant all of said entries were admitted in evidence. Defendant's counsel stated specifically that no objections were made to those entries upon which plaintiff had been cross-examined. The entries objected to purported to recite personal transactions with Major concerning the matters in litigation here. They were incompetent and should have been excluded. *Pettis v. Green River Asphalt Co.*, 71 Neb. 513; *In re Estate of Neckel*, 80 Neb. 123.

4. In the county court the executor objected to the allowance of plaintiff's claim because, as he alleged, it was extortionate, fraudulent and without merit, because Major in his lifetime had paid plaintiff for all services rendered; that long before the decedent's death he had settled with and paid plaintiff for all matters between them; that the statute barred all services alleged to have been rendered before October, 1898; that all subsequent services referred to were never in fact performed, and that deceased was never indebted therefor. In the district court the administrator denied generally all allegations in the petition, alleged that whatever claim plaintiff may have had against Major for services was fully settled for and paid by deceased, and that all matters between them were fully settled and adjusted in Major's lifetime, pleaded the statute of limitations and a specific denial that any services had been performed for Major by plaintiff subsequent to October, 1898. After three trials in the district court defendant was permitted to withdraw so much of the answer as referred to payment. By proper motions, exceptions and a cross-appeal, this error, if one was committed, has been presented for our decision.

Defendant insists that the issues were framed in the county court on the theory of payment, and without a general denial; that thereby plaintiff's contract and Major's liability were admitted, subject only to be defeated upon proof of payment, and the burden was upon defendant; that the issues on appeal must remain identical with

those presented in the county court, and that the court erred in permitting defendant to withdraw the second paragraph of the answer. Claims against the estates of decedents in Nebraska are to be examined and adjusted either by the county judge or a commission of two or more persons appointed by the court for that purpose. The statute relative to the settlement of estates is silent concerning the filing of pleadings or the formation of issues in case a claim is resisted. Section 221, ch. 23, Comp. St. 1907, directs the executor or administrator to exhibit any offset in favor of the estate, and prohibits the allowance of any claim barred by the statute of limitations. Appeals may be prosecuted by the executor, administrator or claimant from any order of the court allowing or disallowing the claim in whole or in part. Section 238, ch. 23, *supra*, provides that the cause shall be tried in the district court in like manner as upon appeals from the judgments of justices of the peace, and authorizes the district court to direct that issues be made up between parties. The legislature did not contemplate that pleadings should be filed in the county court, nor that on appeal the representative of the estate should be held strictly to the theory upon which he made his defense in the county court. Attorneys are not always employed to counsel and direct the representatives of an estate. The administrator is often ignorant of the transaction involved, and frequently upon the hearing something may develop that upon inquiry will lead to knowledge of a defense to the claim. While mock trials ought not to be encouraged in the county court, yet justice will be subserved in a majority of the disputes that may arise in the matter of claims against estates by extreme liberality in the application of the rules of pleading.

In *Herman v. Beck*, 68 Neb. 566, it was held that an administrator could not be defaulted, but that if a claim was allowed in his absence, and it appeared from the record that such allowance was excessive, the judgment would be reversed in the district court. In *Stichter v. Cox*, 52 Neb. 532, Mr. Justice NORVAL reasoned that the statute

did not require the representative of the estate to plead to any claim in the county court. The fifth paragraph of the objections in county court averred that none of the services alleged to have been performed subsequent to October, 1898, were ever in fact rendered, and there is something of a negative pregnant lurking in this denial. However, the allegation in the first paragraph of the objections, that the claim was extortionate, fraudulent and without merit, may be construed as a general denial. We have not overlooked *Estate of Fitzgerald v. Union Savings Bank*, 65 Neb. 97, cited by plaintiff, but we there held that it must clearly appear that the issue tendered in the district court was not presented in the county court or the evidence submitted in the upper court will be received.

Counsel argue with great force that the objections contained a plea of payment, which thereby confessed the plaintiff's demand, and that the second paragraph in the answer should not have been withdrawn. The plea was one of general settlement. Parties often buy their peace and settle claims that are without merit and could not have been enforced in any court. Therefore a plea of a general settlement and payment of all claims and demands does not by implication admit the existence at any time of a specific cause of action against defendant. *Conway v. Wharton*, 13 Minn. 145. Two or more defenses may properly be interposed in an action, provided that they are not inconsistent with one another; and they are not inconsistent unless the proof of one necessarily disproves the other. *Blodgett v. McMurtry*, 39 Neb. 210; *Steenerson v. Waterbury*, 52 Minn. 211; *Rees v. Storms*, 101 Minn. 381; *Gates v. Avery*, 112 Wis. 271. We therefore conclude that the district court did not err in permitting defendant to withdraw said paragraph of his answer.

There are other assignments of error on both the appeal and cross-appeal, but we do not consider that their determination is essential for the future trial of this case.

Whedon v. Brown.

The judgment of the district court is therefore reversed and the cause remanded for further proceedings.

REVERSED.

CHARLES O. WHEDON ET AL., APPELLANTS, v. EDWARD P. BROWN ET AL., APPELLEES.

FILED DECEMBER 17, 1908. No. 15,934.

Primary Elections: CONTESTS: JURISDICTION. The district courts are without power to consider and determine an original action instituted for the purpose of contesting the nomination of a legislative candidate at a primary election.

APPEAL from the district court for Lancaster county: WILLARD E. STEWART, JUDGE. *Affirmed.*

Edward F. Pettis, for appellants.

Field, Ricketts & Ricketts, contra.

ROOT, C.

Charles O. Whedon and Edward P. Brown were candidates at the recent primary election for the republican nomination for state senator in the Twentieth senatorial district in Nebraska. As a result of a canvass of the returns from the various voting precincts in said district, Brown was found to have received six more votes than Whedon, and the former's name was placed upon the official ballot as republican nominee for said office. On the 5th of October, 1908, said Whedon, with plaintiff Webster, both qualified electors resident in said district, commenced this action in the district court against Brown and defendant Dawson, the county clerk of Lancaster county, alleging that the election boards in said precincts prevented qualified electors who desired to vote for Whedon from voting at all; that in counting the ballots in many instances votes for Whedon were counted for Brown, and

that a considerable number of votes for Brown were evidenced by ballots indorsed by only one judge of election. If the statements in the petition are true, Whedon, and not Brown, was the republican nominee at said primary election. Plaintiffs prayed that the ballots cast at said election be recanvassed, and that defendant Dawson procure them for the court's inspection, etc. Defendants demurred on the ground that the court did not have jurisdiction of the subject matter of the action, and that the petition did not state a cause of action in plaintiffs' favor. The demurrer was sustained, and the petition dismissed. Plaintiffs appeal.

1. The primary election law may be found in chapter 52, laws 1907 (Ann. St. 1907, sec. 5862 *et seq.*). The evident purpose of this act is that candidates for legislative and other offices therein named shall be nominated at a primary election held under the secrecy of the Australian ballot law. The act is not more complex than the subject demands, and its provisions in most particulars are reasonably clear. The primaries are to be presided over by the same officers who would officiate if a special election were being held on said day. The ballots are to be counted and the results returned to the county clerk in manner and form provided by law relating to general elections. Ann. St. 1907, sec. 5877. The county clerk and two disinterested electors appointed by him are to commence the canvass of the returns on Friday succeeding the primary election, and the result thereof must be certified to the secretary of state. Sec. 5884. Section 5892, vests the county judge and the county court with power to hear on short notice and in a summary manner contests "as to county, city or precinct officers." By section 5898, the general election laws of the state are made applicable to the various provisions of the primary law, except as to contests. Section 5887, as originally prepared, related specifically to canvassing the returns from city primaries. The standing committee of the house amended said section by adding thereto the following:

"Whenever the candidate for any office under the primary law desires a recount of the votes he shall within three days after the canvassing board has completed its count file with the canvassing board an affidavit requesting and setting forth his reasons for requesting the same. He shall also state in said affidavit the names of the other candidates whose votes he desires recounted." There are further provisions that the vote shall not be recounted unless it shall appear that, conceding the allegations in the affidavit to be true, the result as found by the canvassing board would be changed.

It is argued with much plausibility that this proviso relates solely to securing a recount of the votes cast at city primaries, and, on the other hand, that, although the amendment is in the form of a proviso to the section relating specifically to city primaries, yet the language is so general that said statute comprehends every office voted for at any primary election. We do not deem it essential to decide the scope to be given this proviso. If it does relate to the election under consideration, then a plain statutory remedy for the correction of the principal errors complained of was afforded Mr. Whedon, which he has not pursued either by filing his affidavit within three days of the election or by requesting the canvassing board to recount the ballots. If the statute does not apply to the case at bar, then the primary act does not provide for contests by or against legislative candidates, and Mr. Whedon is without remedy, unless the district court in the exercise of its general jurisdiction may have cognizance of the case. It is apparent that an action in the district court would not furnish a contestant relief, as answer day would ordinarily be subsequent to the general election succeeding the primary, and the judgment of the district court overturning the result of the primary as announced by its officers would be a vain thing, and courts generally would refuse to try those cases. *Johnson v. Dosland*, 103 Minn. 147. In so far as the legislature has made provision, for contesting primary elections, it has

recognized the necessity for expedition and provided for summary and speedy action. The legislature may have been apprehensive of undue interference by the courts with the selection of party candidates for the legislature, and thereby indirectly influencing to some degree the membership of the house and senate. We are of opinion that the legislature, in providing for contesting primary nominations, might lawfully exclude legislative nominees, and that rival candidates for those nominations are bound by the action of the legislative branch of government. *Douglas v. Hutchinson*, 183 Ill. 323; *Hester v. Bourland*, 80 Ark. 145, 95 S. W. 992; *State v. Brown*, 90 Miss. 876, 44 So. 769; *Ramey v. Woodward*, 90 Miss. 777, 44 So. 769.

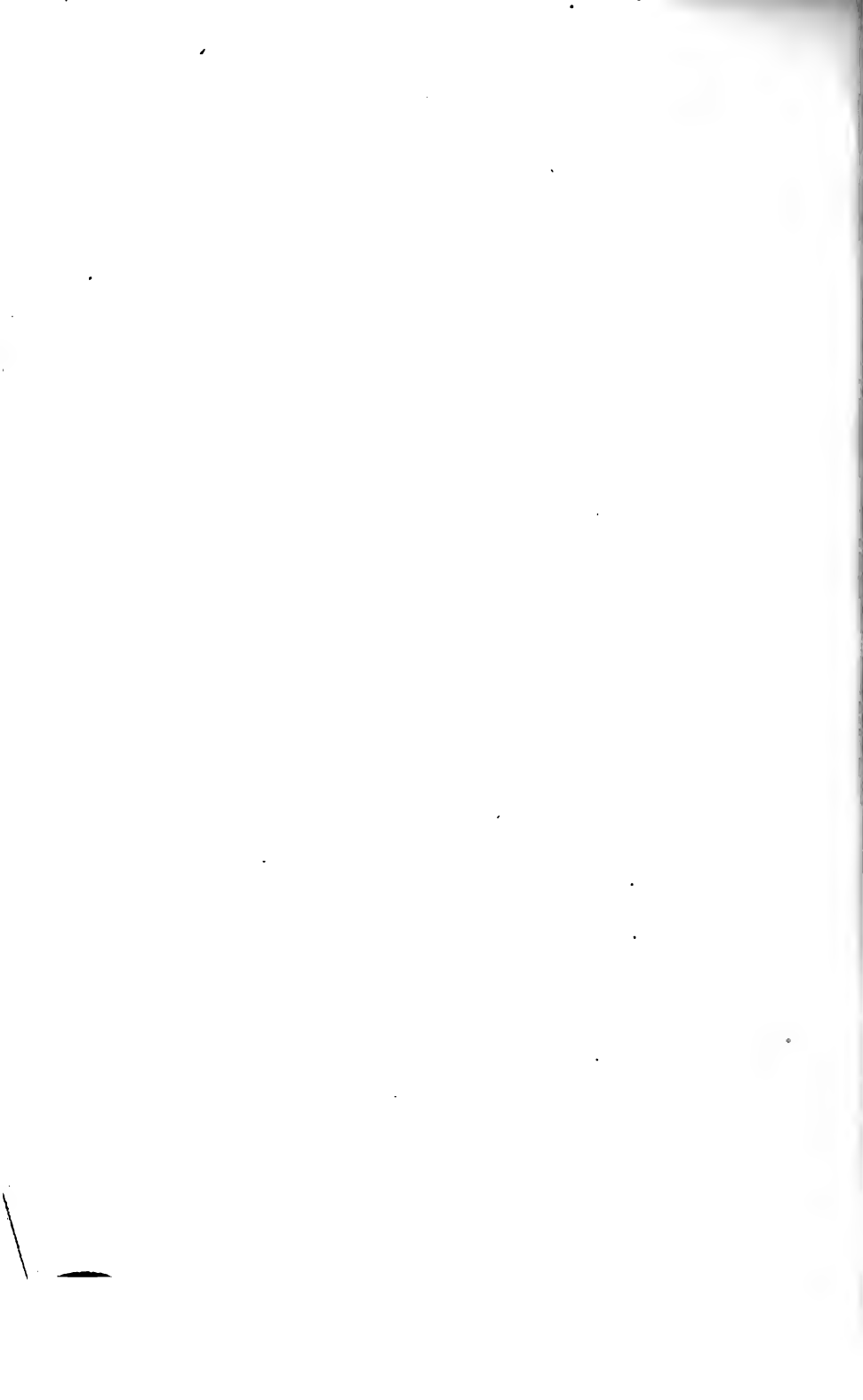
If legislative candidates were inadvertently omitted from the provisions of the primary law concerning contests, we cannot supply the deficiency. *In re Contest Proceedings*, 31 Neb. 262. Counsel for plaintiffs cite *State v. Van Camp*, 36 Neb. 91. That case was mandamus to compel a county clerk to perform a ministerial duty to wit, to compare and canvass an abstract of votes filed with him. It is apparent that the case does not support plaintiffs' contention. We do not deem it necessary to discuss the general election laws concerning contests, because, as heretofore demonstrated, the primary law specifically excludes the general election statute in the matter of primary election contests. Nor are the opinions, cited from states wherein the primary election law provides for contests, of value in deciding the instant case.

We are of opinion that the record is without error, and we therefore recommend that the judgment of the district court be affirmed.

FAWCETT and CALKINS, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.



CASES DETERMINED
IN THE
SUPREME COURT OF NEBRASKA
AT
JANUARY TERM, 1909.

PETER FREDERICK, APPELLANT, v. MARY ANN BUCKMINSTER ET AL., APPELLEES.

FILED JANUARY 9, 1909. No. 15,420.

1. **Pleading: CONSTRUCTION ON APPEAL.** Where a party fails to test the sufficiency of a pleading by demurrer or otherwise, and proceeds to trial on the merits on the theory that it tenders a certain issue, which is litigated and submitted to the jury, if by any reasonable construction of the language the pleading can be construed to raise such issue, it will be held to do so.
2. **Answer examined,** its substance stated in the opinion, and held sufficient to sustain the verdict and judgment.
3. **Judgment: INDEFINITENESS: REVIEW.** Indefiniteness is not a ground for the reversal of a judgment. If it is too indefinite to be enforced, the party complaining is not affected thereby, and, if it is desired to make it more definite and certain, application should be made for that purpose to the court where it was rendered.

APPEAL from the district court for Richardson county:
WILLIAM H. KELLIGAR, JUDGE. *Affirmed.*

R. C. James and Reavis & Reavis, for appellant.

Edwin Falloon and C. Gillespie, contra.

BARNES, J.

The appellant, who will hereafter be called the plaintiff, commenced this action in the district court for Rich-

Frederick v. Buckminster.

ardson county to restrain the defendants and appellees from opening, tearing down and leaving open the gates placed by him on what he alleges were certain private roads over and across his farm situated in said county. The petition is too voluminous to be set forth in this opinion. It is sufficient to say of it that although it is somewhat informal, and while perhaps it may have been open to attack by motion or demurrer, it was treated in the court below as sufficient to state a cause of action. Defendants' answer alleged, among other things, that in 1856 there was laid out and established the town site of St. Stephen situated upon the lands described in the plaintiff's petition; that defendant Mary Ann Buckminster bought certain lots in said town site, according to the plat thereof, which appear to be sufficient in number to comprise several acres of land; that some years thereafter the town site of St. Stephen was abandoned; but defendant alleged that she took possession of the land purchased by her, as aforesaid, made the same her permanent home, and that she now resides thereon. The answer admitted that the plaintiff purchased the land described in his petition, which surrounds the lots or tract of land now owned and occupied as a home by the above named defendant. It was further alleged in the answer that at the time the defendant purchased the lots in question, and made the same her permanent home and long prior to that time, there had existed a well-traveled road from her house across the premises of the plaintiff to, and connecting with, the public roads of said county; that said road had been used continuously and uninterruptedly by the public generally and the plaintiff since the year 1856, and has been so used by her for more than 20 years; that just before the commencement of this action the plaintiff erected and maintained certain gates, with locks thereon, across said last named public road, and attempted to permanently close the same and thus deprived the defendant of any means of ingress or egress from her home to the other public roads of said county; that the trespass complain-

of in plaintiff's petition consisted of opening and removing the gates so erected by the plaintiff, which acts the defendants averred they had a good and perfect right to do. The answer concluded with a prayer that the said last named road be found and declared to be a public road, and that the plaintiff be forever enjoined from closing up said road or in any manner obstructing the same, together with a prayer for general affirmative relief. The pleading, although somewhat defective in form, was treated by plaintiff and his counsel as a sufficient answer to the petition, and as a defense thereto. It was so treated by the trial court; and the plaintiff during the progress of the litigation was required to file a reply thereto instant. Whether such reply was filed or not we are unable to state, on account of the imperfect condition of the transcript which has been lodged in this court. It appears that, when the cause came on for trial, a jury was impaneled to determine the issue of fact thus presented. This procedure was not questioned, but was acquiesced in by all parties to the action. After a protracted trial, a verdict was returned for defendants by which it was found that the road described in defendants' answer was a public highway. Judgment was rendered on the verdict, and a journal entry thereof prepared, which was signed by the presiding judge, but for some reason was not filed and recorded for a considerable time thereafter. Within six months from and after the recording of the decree, plaintiff employed his present counsel, who filed a motion for judgment on the pleadings *non obstante verdicto*. The motion was overruled, and the plaintiff thereupon appealed from said ruling and the decree above mentioned to this court.

Appellant's main contention now is that the defendants' answer stated no defense to the cause of action set forth in his petition, and for that reason he was entitled to a judgment on the pleadings, notwithstanding the verdict and decree. In cases where the state of the pleadings and the previous conduct of the parties justifies it such a mo-

tion may be sustained; but, where a pleading has been treated as sufficient by the court and all of the parties to the action, and no objection has been made to it until after verdict and judgment, it will be liberally construed, and, if possible, will be held sufficient to sustain the judgment, as we shall presently see. It is true that the answer in this case contained no general denial, but its affirmative allegations were sufficient to charge that the *locus in quo* was a public highway or public road, and justify the defendants' acts in removing the plaintiff's gates therefrom. This was in effect a denial of the cause of action set forth in plaintiff's petition and such facts, if true, constituted a defense thereto. It was so treated by both parties to the action, as well as by the trial court, until after verdict and judgment.

In *Western Travelers Accident Ass'n v. Tomson*, 72 Neb. 674, it was said: "No attack was made upon the petition by motion or otherwise, and it is the settled rule of this court, sanctioned by decisions so numerous that citation of them is not requisite, that, after a verdict and judgment, pleadings will be liberally construed for the purpose of upholding the result reached by the court and jury." In *Parkins v. Missouri P. R. Co.*, 76 Neb. 242, it was held that "where a party fails to test the sufficiency of a petition by demurrer, but answers to the merits and proceeds to trial on the theory that it tenders a certain issue, which is litigated and submitted to the jury, if by any reasonable construction of the language the pleadings can be construed to raise such issue, they will be held to do so." In *National Fire Ins. Co. v. Eastern Building & Loan Ass'n*, 63 Neb. 698, it was held that, where from the nature of the answer and testimony it appears that both parties have placed the same construction on a petition, the court should not ignore such construction in passing upon a demurrer *ore tenus*, even though the petition, standing alone, might not admit of such construction. In *Bennett v. Bennett*, 65 Neb. 432, where evidence had been adduced in support of the allegations of a petition without

objections, and judgment had been rendered thereon, it was held that the pleading would be liberally construed, and that indefiniteness would not be considered. In *Doering v. Kohout*, 2 Neb. (Unof.) 436, it was decided that, if the plaintiff accepts an answer as stating a defense, he cannot for the first time in the supreme court challenge its sufficiency. Indeed, this rule is so well established that no further citations are required to support it.

The plaintiff having treated the defendants' answer as sufficient and as stating a good defense to the matters set forth in his petition, until after verdict and judgment against him, he will not now be heard to question its sufficiency, if by any reasonable or liberal construction it can be held sufficient to support the judgment. For the reasons above stated, we think it sufficient for that purpose, and therefore the plaintiff's contention must fail.

The plaintiff's second assignment is that the judgment or decree is indefinite, and therefore must be reversed and set aside. We are not convinced that this objection is well founded. It is true that the plaintiff in his petition mentioned three private roads upon which he claimed he had erected gates or bars, and that the defendants had unlawfully opened, removed and destroyed the same. The defendants answered, justifying the removal of the plaintiff's gates upon one road only, which was described and alleged to be a public road leading from the defendants' place of residence to the other public roads of Richardson county. The verdict of the jury declared the road described in the defendants' answer to be a public highway, and the decree, responding to the terms of the verdict, granted the defendants affirmative relief in relation to that road. So we are unable to say that the decree is open to the objection of indefiniteness. If, however, plaintiff's contention be true, we are not certain that this is a sufficient ground for a reversal of the judgment. If the decree is so indefinite that it cannot be enforced, surely the plaintiff is not prejudiced thereby, because an attempt

Vandewege v. Peter.

to enforce it could be successfully resisted by him. If, on the other hand, it is desired by either party that the judgment should be more definite and certain in its terms, the the proper practice would be to file a motion in the district court to correct it in that respect.

For the foregoing reasons, we are of opinion that the record contains no reversible error, and the judgment of the district court is therefore

AFFIRMED.

DEAN, J., not sitting.

EMMA S. VANDEWEGE ET AL., APPELLANTS, v. WILLIAM E. PETER, APPELLEE.

FILED JANUARY 9, 1909. No. 15,433.

1. **Evidence at Former Trial: DILIGENCE.** To entitle a party to reproduce the testimony of a witness given on a former trial, he must show that, by exercising reasonable diligence, he has been unable to secure the attendance of such witness at the trial.
2. ———: **ADMISSIBILITY.** An attorney who took part in the former trial of a cause and heard the testimony of a witness given therein, but is unable to remember his evidence or the substance of all that the witness testified to, both on direct and cross-examination, is not competent to reproduce the evidence of such witness; and the fact that he made notes of a part of the evidence, from which he can only partially refresh his recollection, does not render him competent.

APPEAL from the district court for Lancaster county:
ALBERT J. CORNISH, JUDGE. *Reversed.*

A. J. Sawyer and W. E. Stewart, for appellants.

Burkett, Wilson & Brown, contra.

BARNES, J.

This action was brought in the district court for Lancaster county by the appellants to recover on four prom-

issory notes executed and delivered by appellee to his grandmother, Sevilla Peter, on the 30th day of April, 1901, for \$200 each, bearing interest at 5 per cent. from date. The notes were given for the purchase price of 40 acres of land sold by Sevilla Peter to the appellee. On July 8, 1901, Sevilla Peter died, leaving a will, which was duly admitted to probate, and by which the notes in controversy were bequeathed to the appellants, who are her grandchildren. The defendant by his answer admitted the giving of the notes, but says that on or about the 7th day of June, 1901, he paid them to Sevilla Peter, who was then the owner thereof. It was therefore incumbent upon him to prove such payment by a preponderance of the evidence. It appears that at the trial in the county court the defendant produced a witness named Rosa Bowling, an illiterate person, for the purpose of testifying to a conversation, which it is claimed she overheard, to what she had seen at the time of the alleged payment, and to identify a receipt which the defendant claims was given to him by Sevilla Peter on June 7, 1901. The testimony of this witness given in the county court, both on direct and cross-examination, seems to have been quite voluminous, and, as her testimony and the alleged receipt constituted the only evidence adduced by the defendant upon the question of the alleged payment, it was vital to the determination of this case. An appeal was taken from the judgment in the county court, and when the case came on for trial in the district court Rosa Bowling was not present. It appears that no subpoena had been issued to secure her attendance as a witness, and no attempt had ever been made to take her deposition. The defendant testified that she resided in Beatrice; that he saw her the morning before the trial, and left \$2 with her to pay her fare to Lincoln, and that she promised she would be present to give her testimony. The witness however made affidavit that defendant gave her no money whatever with which to pay her way to Lincoln, and, as above stated, she was not present at the trial.

Without any other showing of an effort to obtain her testimony by deposition or have her present to testify, the defendant was permitted to call Judge Williard E. Stewart, who was counsel for two of the plaintiffs, and was present at the trial in the county court and heard her evidence on the former trial, as a witness to reproduce her former testimony before the jury. This was done over the plaintiffs' objections. For the purpose of laying a foundation for the introduction of this evidence, defendant's counsel propounded the following questions to Judge Stewart: "Q. Are you an attorney at law? A. I am. Q. You are one of the counsel engaged in the trial of this case both in the county court and in this court on behalf of the plaintiffs? A. Yes, sir. Q. Were you present, and did you hear the testimony of Mrs. Rosa Bowling in the county court on the trial of this cause? A. I was present and heard her testimony. Q. Did you cross-examine her upon the trial? A. Yes, sir. Q. Did you take notes of her testimony upon that trial? A. I made memoranda of a *portion* of her testimony. Q. Have you those memoranda now in your possession? A. Yes, sir. Q. You may take those memoranda and refresh your memory as to her testimony in order that you may answer my questions as to what she testified to." Over plaintiffs' protest the court compelled the witness to testify, and the defendant was thus permitted to reproduce the evidence of the absent witness. This the plaintiffs contend was prejudicial error. The principal objections to the reception of this evidence relied on by the plaintiffs are: First—The absence of the witness Rosa Bowling, whose testimony was attempted to be reproduced, was not satisfactorily accounted for; second, no reason was shown for not taking her deposition; and, third, the witness who attempted to reproduce her evidence was incompetent, for the reason that he did not remember all of her former testimony, and had no sufficient memoranda from which to refresh his recollection.

The rule as to the reproduction of the evidence of a

witness given upon a former trial may be stated as follows: First, that the party against whom the evidence is offered, or his privy, was a party on the former trial; second, that the issue is substantially the same in the two cases; third, that the witness who proposes to testify to the former evidence is able to state it with satisfactory correctness; fourth, that a sufficient reason be shown why the original witness is not produced. The existence of the first two requirements must be admitted, but the sufficiency of the evidence necessary to establish the other two propositions is seriously questioned. The memorandum of the former testimony of the absent witness, from which Judge Stewart was compelled to refresh his recollection, was some notes taken by him while engaged as plaintiff's attorney in the former trial. It was not pretended that these notes were at all full or complete, and the witness frequently stated during his direct and cross-examination that he did not remember what the testimony of the absent witness was upon certain points, and that he was unable to recollect a considerable portion of her cross-examination. Originally it was required that the reporting witness should be able to state the language of the former witness, but the rigor of this requirement has been considerably relaxed, and it is now held that, whatever is the degree of strictness required by the law established in a particular jurisdiction, it must affirmatively appear to the satisfaction of the court that the reporting witness can give either the language of the original testimony or its substance, and, if it appears that the witness cannot give the entire examination with the required certainty, his evidence would be rejected. *Omaha Street R. Co. v. Elkins*, 39 Neb. 480; 16 Cyc. 1102; *Emery v. Fowler*, 39 Me. 326, 63 Am. Dec. 627.

Again, we are of opinion that the absence of the former witness was not sufficiently accounted for. The present tendency is not only to require that the absence offered as a basis for admitting the former evidence should be permanent, but to further require that the party offering the

evidence should show to the satisfaction of the court that he could not by the use of reasonable diligence, have procured the attendance of the absent witness. Mere absence from the jurisdiction at the time of trial is a disability by no means equivalent to death, without affirmative evidence that a fruitless search has been conducted in good faith and with due diligence, and that, from ignorance of the witness' whereabouts or other reason, his presence could not have been secured. In this case the temporary residence of the absent witness was in an adjacent county in this state. This was at all times well known to the defendant, and yet he failed to exercise reasonable diligence to secure the presence of the witness or take her deposition. Even where the necessities of the case require the reproduction of the testimony of an absent witness, such evidence at best is but hearsay, and its worthiness only a matter of degree; and, if for reasons of economy and convenience only the testimony of an absent witness is to be received, what further need can there be for rejecting hearsay evidence; and why should litigants bother themselves to procure the attendance or the depositions of witnesses who have once testified in the case? We are not prepared to go to the extent that the rule contended for by the defendant would lead us. While the defendants' failure to exercise reasonable diligence, of itself, may not be sufficient to reverse the judgment of the trial court we think the incompetency of the witness called to reproduce the testimony of Rosa Bowling must have that result. He could neither give the language of her former evidence, nor all of its substance, and his notes, taken at the former trial, were not full enough to enable him to refresh his recollection as to all of her testimony given on her direct and cross-examination. We are therefore of opinion that it was reversible error to require him to attempt to reproduce the evidence of the absent witness.

The record contains several other assignments of error, but, as the questions to which they refer are not likely to arise again, it is not necessary for us to consider them.

In re Estate of Panko.

For the foregoing reasons, the judgment of the district court is reversed and the cause is remanded for further proceedings according to law.

REVERSED.

DEAN, J., not sitting.

IN RE ESTATE OF MATTEUS PANKO.

MINNIE HARMS ET AL., APPELLANTS, V. ESTATE OF MATTEUS PANKO ET AL., APPELLEES.

FILED JANUARY 9, 1909. No. 15,431.

1. **Specific performance of a contract** between the sole legatee and devisee in a will, who was an aged woman, and her children, the heirs of her deceased husband, by the terms of which the larger portion of the property left to the widow is to be surrendered by her and distributed among the children, upon the consideration that certain objections to the probate of the will filed by some of the heirs will be dismissed, will not be enforced, unless the proof that such a contract was entered into is clear and satisfactory.
2. **Specific Performance.** In such a case, the transaction will be closely scrutinized and the contract must be clearly proved. No presumptions will be indulged in its favor.

APPEAL from the district court for Otoe county: PAUL JESSEN, JUDGE. *Affirmed.*

E. R. Hitchcock, George A. Adams and S. P. Davidson,
for appellants.

Hugh La Master and D. W. Livingston, contra.

LETTON, J.

Matteus Panko, who was a resident of Otoe county, died leaving a last will, by which he gave to his wife, Maria Panko, absolutely, all of his property, both real and per-

In re Estate of Panko.

sonal. The will recites that he gave it to her "because of the love and devotion I have for my said wife and my confidence in her that she will divide the balance of said property that may remain at her death share and share alike among our lawful children." His wife was named as executrix. The will was offered for probate, when objections were filed by Anna Lipps, Christina Straube, Minnie Harms and Paulina Harms, daughters of the deceased, alleging mental incapacity of the testator and undue influence on the part of their brothers. These objections were afterwards withdrawn, and the will admitted to probate. The executrix qualified, paid the debts and expenses, and made a final report asking for an order "that all the property be delivered to Maria Panko, the sole devisee and legatee under the will." An application was made for a different distribution of the estate by certain of the children of the decedent, alleging, in substance, that after the objections to the probating of the will had been filed by them, Maria Panko, their mother, the sole beneficiary under the will, and the others heirs of the deceased, Herman Panko, Matteus Panko and Godfrey Panko, agreed verbally with them upon a division of the assets of the estate, by which the widow was to have the sum of \$7,000 in money or notes to be selected by her; that their sister, Anna Lipps, was to have \$4,000 in money or notes to be selected by her, and the remainder of the estate was to be divided between all the other children and heirs equally, except that two grandchildren were to have the share of their mother; that the agreement was made between all the children and the widow in good faith and in order to prevent litigation, and that, relying on the agreement, the petitioners dismissed and withdrew the objections filed to the will; and praying that the property be distributed according to the alleged oral agreement. The allegations were denied by answer. A hearing was had in the county court, which found for the petitioners and ordered distribution accordingly. An appeal was taken to the district court, which found for the lega-

tee, Maria Panko, and rendered judgment dismissing the application. An appeal has been taken to this court from this judgment.

We have heretofore held that a mutual promise made between heirs to an estate, whereby the objections filed or made to the probate of a will are dismissed in consideration of an agreement by all of the parties concerned in the estate that the property is to be divided among them upon terms other than those provided in the will, will, if made in good faith, be enforced by a decree of court. *Grochowski v. Grochowski*, 77 Neb. 506, 510. In that case the agreement which it was sought to enforce was evidenced by a writing, and the defense was that such a contract was invalid, as being against public policy, and without consideration. The fact of the contract having been entered into was not questioned. In this case it is conceded that the law of the *Grochowski* case applies, and it is urged that the evidence is convincing that the contract was entered into, and that the findings and judgment are against the evidence. Before examining the evidence in detail, we deem it advisable to say that as a general rule the court will not enforce the specific performance of a contract of this nature, unless the proof is clear and satisfactory that the alleged contract was actually entered into. More especially is this the case where the contract which is the subject of inquiry has been entered into between an aged mother upon the one hand and her children or some of them upon the other, and where the result of the contract would be to deprive the aged parent of property or rights therein for the benefit of the children. In such a case the transaction will be closely scrutinized and must be clearly proved. No presumptions will be indulged in its favor.

The will was filed for probate on February 6, 1906, and on February 28 the objections were filed. Shortly after his Henry Harms, husband of one of the contestants, and Godfrey Panko met and a settlement was suggested. Another meeting was held at which Harm Harms, another

son-in-law, was also present. This meeting was at the home of the Rev. William Beckman, who was the pastor of the church to which the father, mother and some of the children belonged. He was a friend of all of the parties, and had been appointed special administrator of the estate pending the hearing upon the objections to admitting the will to probate. It seems that three meetings took place, at which the two Harms, Godfrey Panko and Mr. Beckman were present. On the 10th of March, 1906, at Mr. Beckman's house in Burr, he suggested that the matter might be settled by giving to Mrs. Lipps \$4,000, the other property to be divided equally among the remaining heirs, the grandchildren to receive the share that their mother would have had, if alive; that each heir should pay to the mother \$50 that year and on the 1st day of January, 1907, and every succeeding 1st day of January each heir should pay \$100 to the mother. This was put in writing and agreed upon between the parties present. It was then arranged to meet at the house of Mrs. Panko to submit the proposition to her. On the morning of March 13 the parties met there, as agreed. Mr. Beckman produced the writing with this proposition, but the widow rejected it, and said she wanted the will to stand, but said further that, if she agreed to a settlement, she wanted a portion of the property at once. Beckman then proposed that she should receive \$7,000 or its equivalent in notes to be selected by her; that Mrs. Lipps should receive \$4,000 in like manner, and that the rest should be equally divided among the remaining heirs. Up to this point there is substantially no conflict in the testimony. Mr. Beckman testifies that he then requested every one of the persons interested who were present to state whether they were willing to enter into the agreement, and that the widow, Matteus Panko and Godfrey Panko, Straube and the two Harms all assented; that Matteus Panko was present when the agreement was consummated, and he thinks that Matteus was the first person who left. Beckman further testifies that the evening before they went to Mrs. Panko's

house a paper was drawn up and signed by Mrs. Lipps, in which she agreed that, if she received \$4,000, she would make no further claim upon the property of her mother, and the payment of this sum was guaranteed to her in writing by the two Harms brothers; that this paper was read and explained to the mother at the time, and handed to Matteus Panko, who said he would take it to Sterling and have it properly executed by the notary. Mr. Beckman said he told the widow it might take years to settle the matter if it was in litigation. On cross-examination it developed that at the time this proposition was made the two daughters, Mrs. Lipps and Mrs. Eilers, knew nothing about it, nor did the two grandchildren. This was the first time that the matter of settlement had been spoken of to the widow by any of the parties so far as the testimony shows. Henry Harms testified substantially as did Mr. Beckman, and so also did Harm Harms and Herman Straube, who were both present at the time. Mr. Boatsman, a notary of Sterling, testified that Matteus Panko brought him the paper, signed by Mrs. Lipps, on the afternoon of March 13, and said that he wanted it stamped; that he called up Mrs. Lipps over the telephone, and, after speaking to her, put his jurat upon it and handed it back to Panko. Fred Moss, one of the witnesses to the will, says that he had some conversation with Matteus Panko and Godfrey Panko about the probating of the will soon after this, and that they told him that a settlement had been made. Charles Lipps, husband of Anna Lipps, also testified that Godfrey told him they had settled, and that some time afterwards the widow said to him that she was willing to make settlement, but that Matteus objected. Mrs. Lipps testified that she had a conversation with her mother after the alleged settlement, and asked her mother if she was going to pay her; that her mother said she could not because the law would not allow her to pay it.

For the defense Mrs. Panko denies that the agreement was made when all the parties were together. It appears that she does not understand English at all, nor German

very well, speaking only Wendish. She says that Matteus was not there at the time the talk was had with Mr. Beckman, but that he came in afterwards. Mrs. Eilers testifies she was not present, and that she never agreed to the settlement. Matteus Panko testifies that when he arrived all of the others were in the house, and that Mr. Beckman told him they had settled; that he was not asked to agree, and did not agree; that he was called to go then by telephone from a neighbor; that he did not inquire as to the terms of the settlement, and said nothing about it; that he was asked to take a paper to Mr. Boatsman at Sterling, and did so. He admits that he went to Nebraska City the next day to have the will probated, and that he owes his mother a large sum of money. His account of his actions at the meeting is vague and unsatisfactory, and in other respects it seems doubtful, but his brother, Herman Panko, corroborates him in saying that he came after the settlement was made. As to himself, Herman testifies that he agreed to the proposal made by Mr. Beckman the day before, but that, after he went to his mother's house and the arrangement was changed, he was not asked whether he agreed to the new proposal, and did not agree to it, but that afterwards he said that the settlement was made and he would stand to it if the others would. It will be seen from this resume of the evidence that, while Beckman, Harms and Straube agree as to what took place at the home of Mrs. Panko, they are contradicted as to the fact of Matteus Panko being present at the time of the proposed agreement being assented to by Herman Panko, Mrs. Panko and Matteus Panko. It is true that there are several circumstances, such as the immediate withdrawal of the objections to the probate of the will and the statements made afterwards by the sons, which tend to support the testimony of the plaintiffs as to what took place that morning, but there is a direct conflict in the testimony, and it is not clear to our minds that Mrs. Panko clearly understood the whole transaction and what her rights were in the premises. It also appears

Etmund v. Etmund.

that neither Mrs. Eilers nor the two grandchildren were present at the transaction, either in person or by representation and it does appear that they had no voice in it. The witnesses were all before the judge of the district court, who had opportunities of observing their demeanor and judging of the truth or falsity of their testimony which we do not have. His finding and judgment upon the matter are entitled to our consideration and in such a case as this we do not feel justified in substituting our judgment for his upon the facts, even if it were proper for us to do so.

Upon the whole case the evidence is not so clear, satisfactory and convincing that it would justify us in virtually setting aside the will of the deceased and depriving the aged widow of about \$20,000 worth of property by reversing the judgment of the district court and compelling the performance of a contract such as the one sought to be established in this case.

The judgment of the district court is

AFFIRMED.

DEAN, J., not sitting.

**ALMT ETMUND ET AL., APPELLEES, V. JOHN ETMUND,
APPELLANT.**

FILED JANUARY 9, 1909. No. 15,440.

1. **Executors and Administrators: APPEAL: FINAL ORDER.** The appellant, who was administrator of one estate and guardian of two others, in which the same persons were interested, intermingled the funds and accounts of said estates. He filed a final report applying to all three of the estates in the county court, which made findings and an informal order thereon. Afterwards, he filed a supplemental report in connection with and based upon his former report and upon the findings of the county court. Separate appeals were taken to this court from both orders. The appellant objected in the district court that the first order was not a final order and not appealable, and also that the second

Etmund v. Etmund.

order, which is set forth in the opinion, was not a final order. *Held*, (1) That, whether the first order was final or not, the adoption of the first report and findings in the supplemental report carried the whole accounting forward into the second order which terminated the matters in issue, and that an appeal from this order brought up the whole record; (2) that the second order was final and appealable.

2. ———: ———: **TRANSCRIPT.** Where a partial transcript on appeal from the county court was filed in the district court within the statutory time, it was not error for the district court to allow a portion of a transcript in the same case, which had formerly been filed in the district court, to be attached thereto and made a part thereof.
3. **Costs: SEPARATE APPEALS.** Where separate appeals are filed in the district court and the cases are consolidated, the costs of the several transcripts are properly taxed against the losing party, since each transcript is necessary to the appeal.

APPEAL from the district court for Lancaster county:
LINCOLN FROST, JUDGE. *Affirmed.*

Billingsley & Greene, for appellant.

Berge, Morning & Ledwith, *contra*.

LETTON, J.

This is an appeal from a judgment of the district court for Lancaster county rendered on appeal from certain probate and guardianship proceedings in the county court of that county. The appellant, John Etmund, is administrator of the estate of Wiard Etmund, deceased. He is also the guardian of Wiard Etmund, Henry Etmund and Anna Etmund, minor heirs of Wiard Etmund, and is also guardian of Almt Etmund, insane, who is the widow of Wiard Etmund, deceased. The deceased, Wiard Etmund, was a brother of the appellant. The appellant was appointed in these several capacities at different times prior to 1886. During the 14 years next after his appointment the appellant filed a number of reports in the county court with reference to his administration of these trusts, but his reports were confused and indefinite, so much so that

it was almost impossible to tell to which account the various items belonged or in what capacity they were filed; some of these reports being filed by him as administrator, some as guardian of the minors, some in the insane guardianship matter. The disorderly, careless and involved nature of the accounts kept by the appellant was such that it required the service of an expert accountant to disentangle them before his final report was approved in the county court.

On the 8th day of November, 1901, a final report, apparently intended to apply to all three estates, was filed by the appellant. Objections were filed to this report by the minor heirs. A hearing was had upon the objections, and upon May 6, 1903, the county court entered its findings and decree in the three trusts. The court made full and specific findings as to certain items, and, after finding the sums with which the appellant should charge and credit himself, it was found that he "should pay over of the balance remaining in his hands 12-18 to the present legal authorities to receive the same for Almt Etmund, 2-18 to Anna Etmund, 2-18 to Henry Etmund and 2-18 to Wiard Etmund; * * * and that thereupon his resignation in his said several capacities shall be accepted, and he be discharged from all further duties and liabilities by reason of any matters and transactions covered in this decree. To all of which findings and judgment each and all of the parties interested herein except, including the guardian *ad litem*, T. M. Wimberley, and pray an appeal. Judgment accordingly." An appeal bond was filed on May 9, 1903, and the transcript was filed in the district court upon June 9, 1903. A supplemental report was afterwards filed in the county court, and objections thereto were filed by the minor heirs. A hearing was had upon the supplemental report and the objections, and on August 15, 1903, the following final judgment was entered: "It is therefore considered, adjudged and decreed by the court that the said report be, and the same is, in all things confirmed, and the said John Etmund, administrator of

the estate of Wiard Etmund, deceased, is discharged as such upon compliance with the decrees of this date made in the matter of the guardianship of Almt Etmund, insane, and of Anna Etmund, Henry and Wiard Etmund, his wards."

An appeal from this judgment was taken and filed in the district court September 8, 1903. In the district court a motion to dismiss the appeal filed June 9, 1903, was made on the ground that the order from which the appeal had been attempted was not final. The motion was overruled, which is assigned as error. This contention is earnestly argued, and a number of authorities are cited. In the view we take of the case, we think it is unnecessary to consider this assignment, since there is no question but that the order made upon August 15 was a final order of discharge. This was based upon the first report and the findings made and entered upon it on May 6. Conceding that the order of that date was merely interlocutory, its findings were adopted in the supplemental report of the appellant, which recited that it was made in connection therewith, and the first order was thus carried forward with and formed part of the supplementary findings and order of August 15. We think the appeal from the latter judgment, therefore, opens both reports.

When the transcript of the supplemental proceedings in the county court was filed in the district court, the transcript formerly filed was attached thereto without leave of court. A motion was then made by the appellant, asking that he be allowed to separate the transcript filed June 9, 1903, from the ten pages of supplementary transcript filed September 8, 1903, without leave of court. On the hearing of this motion, the court found that the first thirty-three pages of the transcript filed June 9 had attached to it without leave of the court at the time ten additional pages filed September 8, but at this hearing, on the motion of the minors, the court granted leave as of September 8, 1903, to attach the filings of June 9, 1903 to those of September 8, 1903, and to consolidate same. The

effect of this order was to make that portion of the transcript filed June 9 a part of the transcript filed upon September 8.

Following this order, the guardian moved the court to dismiss the appeal for the reason that the order and decree was not final, which was overruled. The certificate of the county judge to the transcript of September 8 shows that the transcript included "the final report, etc., objections to the final report, etc., objections to the final report, amended final report, findings, decree and judgment, order allowing appeal * * * objections to the supplementary report, decree, and appeal bond." The district court, therefore, had before it a duly authenticated transcript of all the proceedings that had been had upon the original final report, the amended final report, and upon the supplemental report, together with all the findings and the final decree. This was sufficient to confer jurisdiction. A motion was made in the district court to consolidate all three cases and transfer the case to the equity docket. This motion was overruled, but afterwards, by agreement of the parties, the cases were consolidated and the cause was tried to a jury. No bill of exceptions was preserved; hence, the only points which we can consider are those raised by the exceptions in the transcript and argued in the brief. We think the appellant is in no position to stand upon technical objections to the proceedings of the district court. The district court seems to have adopted a method for the disposition of the confused and disorderly accounts submitted to it of which the appellant should be the last person to complain.

We think no error was committed in the disposition of the case. The appellant apparently made no attempt in his administration of these trusts to keep the funds separate and apart. He filed an involved and complicated account which no one, unless an expert bookkeeper, could understand or unravel. He introduced almost inextricable confusion into the affairs of the several trust estates,

In re Estate of Fletcher.

and he now seeks to take advantage of these wrongs and troubles of his own creation.

As to the motion to retax costs, the district court sustained the motion in part and overruled it in part. There were three separate appeals filed in the district court, and, of course, the costs for the separate transcripts were properly taxed against the losing party, which is the main complaint made as to the ruling upon the motion.

The judgment of the district court finding no error in the record is

AFFIRMED.

DEAN, J., not sitting.

IN RE ESTATE OF WILLIAM FLETCHER.

MARY J. FLETCHER, APPELLANT, V. WALTER S. FLETCHER
ET AL., APPELLEES.

FILED JANUARY 9, 1909. No. 15,387.

1. **Homestead: ACCOUNTING BY SURVIVOR.** A widow need not account to the estate of her husband for the rents and profits of their homestead which have accrued subsequent to his death.
2. **Executors and Administrators: INVENTORY.** The inventory filed by an executrix is not conclusive, but is open to explanation or denial.
3. ———: **ACCOUNTING.** The executrix will not be given credit in her account for money expended for her personal advantage concerning said estate.
4. ———: **ALLOWANCE TO WIDOW.** The widow of a testator is entitled, under subdivision 1, sec. 176, ch. 23, Comp. St. 1905, to the chattels therein specified, and also to \$200 in cash from her husband's estate, and said property is not assets of the estate in the hands of the executor.
5. ———: ———: **FINAL ORDER.** F. by his last will and testament, which was duly probated, devised all of his property to his wife during her natural life, and named her as executrix, with succession in said office to a son after her death. Subsequent to that time said property is to be sold and the proceeds divided

In re Estate of Fletcher.

among four devisees. More than a year subsequent to her appointment as executrix the widow applied to the county court for maintenance from said estate. Notice was not given of the filing or presentation of said application, nor was the time for the settlement of said estate extended. The court allowed \$25 a month, pending said settlement, to be paid from the assets of said estate. Thereafter a devisee secured a modification of said order so that from said date the allowance was to be paid only out of the income from said estate. An appeal was not prosecuted from either of said orders. *Held*, That the order as modified was valid, binding all persons interested in said estate.

6. Cases Reviewed. *Estate of James v. O'Neill*, 70 Neb. 132, distinguished, and *Rieger v. Schaible*, 81 Neb. 33, approved.

APPEAL from the district court for Saline county:
LESLIE G. HURD, JUDGE. *Reversed*.

J. E. Addie and R. D. Brown, for appellant.

R. M. Proudfit and R. P. Anderson, *contra*.

ROOT, J.

Appeal from a judgment of the district court for Saline county, modifying a judgment of the county court settling and allowing the final account of Mary J. Fletcher as executrix of the last will and testament of her husband, William Fletcher, deceased. The executrix appeals.

1. The attorneys who appeared for the executrix have requested that their names be stricken from the docket as her attorneys, and from the briefs filed herein. No one appeared to argue the case for the executrix, but the briefs referred to are still on file, and, there not being any evidence before us that appellant has elected not to urge the errors assigned, we have concluded not to affirm the judgment under rule 2 of this court.

2. William Fletcher died August 7, 1904, and his last will and testament was duly probated September 7 of that year. The widow is therein given, during her natural life, all property, real and personal, of the testator, and is appointed executrix of said will, with succession in said office to Walter Fletcher, a son of the deceased. After

the death of the widow the property of the deceased husband is to be sold and the proceeds equally divided among four children. The testator directs that his debts and the expense of administering his estate shall be paid out of his personal property, and, if that is insufficient, the executrix is authorized to sell so much of his real estate as may be necessary to supply the deficiency. Three hundred and fifteen dollars and thirty-five cents in claims were allowed against said estate. The executrix appealed from the allowance of one claim, and on the 14th day of December, 1905, it was disallowed in the district court, but at the costs of the estate. There then remained, exclusive of costs incurred, but \$70 in claims against said estate.

On the 2d day of January, 1906, on the widow's application, and without notice to the other devisees under the will, the county court granted her an allowance of \$25 a month out of the assets of the estate from the date of the testator's death until the close of her administration for the support of herself and a minor child, said to be under 14 years of age. In June, 1906, said Walter Fletcher applied to the county court for a revocation of said order because it was made *ex parte*, without notice, and for the further reason that the widow was in possession of the estate of the deceased; that to permit the order to stand would necessitate a sale of a portion of the real estate of the deceased and thereby defeat the intention of the testator as evidenced by his will. June 11, 1906, the county judge modified the order first made by him, so that from said date the widow's allowance would not be a charge on anything other than the income from the estate, and directed her to forthwith file her final report. An appeal was not taken from this order. In September, 1906, the executrix filed her report, claiming a balance of \$654 due her from the estate. Objections were filed thereto, and the county judge disallowed some of the items, so that there was found to be due the widow \$504.51. The devisees appealed, and the district court disallowed the

item of \$200 selected and claimed by the widow under subdivision 1, sec. 176, ch. 23, Comp. St. 1905, \$75 attorney fees paid by her, and all of the allowance for support for herself and child. Some questions other than the disallowance of said items are also presented.

3. It is claimed that the widow should account for rent received by her for the use of a house and two lots in the city of Crete. The court found that said property was the homestead of the deceased, and that finding is sustained by the evidence. The widow, upon her husband's death, became seized of a life estate in said homestead, and she need not account for the use thereof or the rents accruing subsequent to her husband's death. *Durland v. Seiler*, 27 Neb. 33.

4. The widow claimed that an item of \$95.40 cash included in the inventory of the estate was not received by her. It is suggested that she is absolutely bound by the inventory, but we do not so understand the law, but that the inventory is open to denial or explanation. *Cameron v. Cameron*, 15 Wis. 1, 82 Am. Dec. 652; *Stewart's Estate*, 137 Pa. St. 175; *Baker v. Brickell*, 87 Cal. 329.

5. The executrix claims credit for seventy-five dollars paid by her to attorneys in securing her allowance and in defending the son's application for the annulment thereof. She cannot charge the estate for moneys expended for her personal benefit and those items were properly disallowed. *McDowell v. First Nat. Bank*, 73 Neb. 307.

6. The item of \$200 cash selected by the widow was properly allowed by the county court, and improperly disallowed by the district court. Comp. St. 1905, ch. 23, sec. 176, subd. 1. Section 200, ch. 23, *supra*, provides that the personal property aforesaid shall not be considered assets in the hands of executors or administrators. The allowance above referred to is in the nature of a specific exemption. *Godman v. Converse*, 43 Neb. 463; *Tomlinson v. Nelson*, 49 Wis. 679; *Jackson v. Wilson*, 117 Ala. 432, 13 So. 521; *Western Nat. Bank v. Rizer*, 12 Colo. App. 102. Counsel argue that sections 152, 153, 154, ch. 23,

In re Estate of Fletcher.

supra, control the instant case, and that they do not provide that the widow of a testator shall receive \$200 or any personal property, and that section 176, *supra*, relates solely to estates of those dying intestate. All of the cited sections were contained in one comprehensive act of legislation. Section 176 specifically provides that the allowance therein referred to shall be made without regard to whether the husband died testate or intestate, and we are not justified in ignoring the plain letter of the law.

7. The devisees other than the widow claim that she is not entitled to an allowance for support pending settlement of the estate. It is suggested that the order for her maintenance was made without notice; that the will of the deceased confined the widow's support to the rents and profits of his estate; that the order for maintenance was not made within the time fixed for the settlement of said estate, nor was the time extended therefor; and that the orders for allowance were interlocutory and did not conclude the estate. The statute is silent concerning notice of the application of a widow for an allowance from the estate of her deceased husband. Such notice is not jurisdictional, although the executor or administrator, ordinarily, ought to be notified, but not necessarily by citation or service of process. *Freeman v. Washtenaw Probate Judge*, 79 Mich. 390; *Bacon v. Judge of Probate*, 100 Mich. 183; *Babcock v. Probate Court*, 18 R. I. 555; *In re Dougherty's Estate*, 34 Mont. 336; *Morgan v. Morgan*, 36 Miss. 348. At one time the Massachusetts statutes required notice of the making of such application. Said law was repealed, and it was thereafter held, in *Wright v. Wright*, 95 Mass. 207, that notice was not necessary. In Georgia the statute provides that the widow of a deceased person or the guardian of his minor children, or any other person in their behalf, may apply to the probate judge for the appointment of appraisers to make an allowance for the support of such widow or minor children, and that notice shall be given to the representatives of the estate. *Held*, That the special administrator might make such ap-

plication and that his act was notice to the estate. *Mackie, Beattie & Co. v. Glendenning*, 49 Ga. 367; *Baggs v. Baggs*, 54 Ga. 95. The order was not void because notice was not given.

The will of William Fletcher did not restrict either the widow or her child to the income of the estate for their support pending the settlement of his estate. Section 152, ch. 23, Comp. St. 1905, cited by appellees does refer to personal estate and the income of the real estate of a testator as the source for payment of the allowance for the widow and minor children, but section 155 imposes a liability on the estate, real and personal, received by devisees, to pay "debts, expenses of administration and family expenses," and we are of opinion that a consideration of all of the sections of chapter 23, *supra*, warrants the conclusion that the maintenance of the widow and minor children of a testator pending the settlement of his estate may be charged upon the real estate itself, if the income therefrom and the personal property be insufficient for the payment thereof and the other expenses of administering such estate. We have not overlooked *Godman v. Converse*, 43 Neb. 463, but the court was there concerned solely with section 176, ch. 23, *supra*, and the testator had explicitly restricted the widow to her bequest, which was generous, for her support. Judge POST was of opinion that the widow was put to her election to renounce the will and take under the law, or remain content with the allowance made for her benefit. In the instant case the will did not in terms exclude the widow from the statutory allowance pending the settlement of the estate.

The executrix did not render her account or settle the estate within one year of her appointment, and the allowance referred to was made subsequent thereto. Nor did the county court extend the time for such settlement. It will be observed that the testator's will contemplated that, as far as possible, the estate should be held intact until the death of his wife, because he has provided for

In re Estate of Fletcher.

an executor to succeed her in that event, and has directed a sale of his property thereafter to the end that the proceeds thereof may be divided among certain devisees. The statute limiting the time within which the estates of decedents shall be settled was not designed to frustrate or render nugatory any lawful provision of a will, and does not control the case at bar. *Scott v. West*, 63 Wis. 529; *Ford v. Ford*, 88 Wis. 122. The court acted within its jurisdiction in making the allowance.

The order granting the widow an allowance was appealable, and until modified was conclusive on all parties in interest. *In re Estate of Stevens*, 83 Cal. 322; *Curtis v. Schell*, 129 Cal. 208; *Strauch v. Uhler*, 95 Minn. 304. The devisees cite *Estate of James v. O'Neill*, 70 Neb. 132, to the effect that said order was interlocutory and could therefore be assailed at the hearing on the executrix' final report. The cited case was dismissed because this court did not have jurisdiction to hear it on appeal, and any suggestions made therein on any other subject were dictum merely. The third paragraph of the syllabus in that case was unnecessary, but, when read with reference to the authorities cited in support thereof, suggests that an order fixing a widow's allowance may be modified as to future support. In such case the modification, where the first order was not secured by fraud, will relate to future, and not accrued, allowance. *Baker v. Baker*, 51 Wis. 538; *Ford v. Ford*, 80 Wis. 565; *Harshman v. Slonaker*, 53 Ia. 467. In *Rieger v. Schaible*, 81 Neb. 33, we held squarely that an order allowing the surviving widow an allowance against the estate of her deceased husband was appealable. An appeal was not prosecuted from the last order made by the county judge and it is binding on the widow.

The judgment of the district court is therefore reversed and the cause remanded for further proceedings.

REVERSED.

DEAN, J., not sitting.

OTTO MEYER, APPELLEE, V. JOHN ENGLISH, APPELLANT.

FILED JANUARY 9, 1909. No. 15,424.

Animals: TRESPASS: DEFENSE: DAMAGES. In a suit for damages to crops injured at different times by trespassing animals, defendant may plead and prove a partial defense extending to damages resulting from plaintiff's negligence and breach of contract to repair fences, and plaintiff may recover other damages for which defendant is liable, where the evidence contains proper data for admeasurement thereof.

APPEAL from the district court for Lancaster county:
LINCOLN FROST, JUDGE. *Affirmed.*

Berge, Morning & Ledwith, for appellant.

W. C. Frampton, contra.

ROSE, J.

Defendant's cattle trespassed upon land cultivated by plaintiff, and the latter brought this suit to recover resulting damages in the sum of \$200 to growing crops, garden, hay and grain, between May 1, 1905, and March 1, 1906. In addition to a general denial, defendant answered in substance that, during the grazing season of 1905, cattle owned by both parties and others were pastured by defendant in a field separated from plaintiff's land by a division fence which plaintiff in consideration of a reduced rate for pasturage agreed to keep in repair, and that whatever damage may have been caused by cattle breaking through the division fence into plaintiff's premises was due to the carelessness and negligence of plaintiff in failing to keep it in repair, according to the terms of his agreement. The making of this contract was denied by plaintiff in his reply. He also denied that defendant pastured his cattle at a reduced rate. The case was tried to a jury. Plaintiff adduced evidence to the effect that the cattle frequently broke into his premises during the summer and fall of 1905 and winter of 1906;

that his garden and crops were damaged in the summer; and that alfalfa in the stack, sweet corn in the shock and matured corn in the field were destroyed in the fall and winter. Though plaintiff admitted in his testimony that the cattle at times had broken into his crops through the division fence, he stated positively they had often broken in elsewhere, and in this he was corroborated by other witnesses. Defendant and a number of his witnesses testified that plaintiff entered into the agreement to repair the division fence, as pleaded in the answer. Plaintiff recovered a judgment for \$110. Defendant appeals.

It is argued by defendant that there should have been no recovery against him, since he is not liable for damages caused by the animals breaking into plaintiff's premises through the division fence which plaintiff agreed to keep in repair, and that from plaintiff's testimony the jury were unable to separate the damages for which defendant was not liable from the damages for which he was liable, if any. In arguing these points defendant assails, as inapplicable to the evidence and as erroneous, the following instruction given by the trial court to the jury: "In the event you find from the evidence that the defendant's cattle, or those being pastured by him, did break through the pasture fence and damage plaintiff's crops, then plaintiff would be entitled to recover such damage, not due to his own negligence, as you find from the evidence he suffered on that account, unless you further find from the evidence that plaintiff had agreed to keep said fence in repair, and that he did not do so, and the damage suffered was due entirely to plaintiff's own neglect in that particular, in which event you will find for the defendant. Any such damage as you find from the evidence plaintiff suffered by reason of the trespass of defendant's stock on account of said stock breaking out elsewhere than where defendant claims plaintiff was to keep up the fence, plaintiff can recover in any event." Defendant's criticism of this instruction, as already indicated, is based on the assertion that it permitted a re-

covery against him on proofs which afforded no basis for separating the damages attributable to plaintiff's negligence from other damages. This point has no substantial foundation in the record.

Plaintiff's evidence showed that after the latter part of November, and after defendant had taken the cattle out of the pasture and transferred them to stalks, they destroyed about 8 tons of alfalfa, of the value of \$8 a ton; 30 shocks of sweet corn, of the value of 50 cents a shock; and 5 acres of corn in the field, averaging 50 bushels to the acre, of the value of 37 cents a bushel. The aggregate of these items of damage exceeds the amount of the verdict. There was also direct testimony from which the jury might properly find that the corn in the field was destroyed during the winter of 1905 and 1906, and that the alfalfa and sweet corn were destroyed by defendant's cattle on plaintiff's premises after the stock had been taken out of the pasture in the latter part of November, and after plaintiff's obligation to repair the division fence between his land and defendant's pasture had terminated. On these proofs and defendant's evidence the jury, under the instruction quoted, were permitted to find in favor of defendant on his partial defense that whatever damage may have been caused by cattle breaking through the division fence was due to plaintiff's negligence, and at the same time find in favor of plaintiff for whatever damage he sustained in the fall and winter, after the cattle had been removed from the pasture, and when he was under no obligation to keep the division fence in repair. The instruction, under the separate items and dates disclosed by the evidence, furnished a proper basis for the admeasurement of damages. It is applicable to the evidence, and is not open to defendant's criticism.

Defendant in his brief has also directed attention to a number of rulings on the admission of evidence, but an examination of the record discloses no error requiring a reversal, and the judgment is

AFFIRMED.

DEAN, J., not sitting.

ESTATE OF CHARLES KEEGAN, APPELLANT, v. MAGGIE
WELCH, APPELLEE.

FILED JANUARY 9, 1909. No. 15,423.

1. **Special Administrators: APPOINTMENT.** Under section 5045, Ann. St. 1907, whenever it is made to appear to the probate court that for any reasonable cause the interests of an estate pending in said court demand action by some one authorized to act prior to the time when letters testamentary or of administration can be issued, it is the duty of such court to appoint a special administrator to act in collecting and taking charge of the estate until an executor or administrator has been appointed.
2. ———: ———: **NOTICE.** And in such a case said court may appoint such administrator immediately, and without notice to the heirs or devisees of the deceased.

APPEAL from the district court for Otoe county: PAUL JESSEN, JUDGE. *Affirmed.*

A. P. Moran and W. F. Moran, for appellant.

Roddy & Bischof, contra.

FAWCETT, J.

On March 3, 1907, Charles Keegan, departed this life, leaving a last will and testament, which, at the time of his death, appears to have been in the custody of defendant, Maggie Welch. On March 16 defendant filed said will in the probate court of Otoe county, together with a petition for the probate thereof. On the same day she filed a petition asking for the appointment of a special administrator to collect and care for the property of deceased until the issuance of letters testamentary. In her petition she alleged that the court had entered an order requiring notice of the pendency of the petition for probate of the will to be published in a newspaper for a period of three weeks, and that by reason thereof the issue of letters testamentary would be delayed for one month; that said Charles Keegan died seized of 30 acres

of farm land in Otoe county (particularly described), together with real estate in the city of Nebraska City; that the farm land had not been rented for the season of 1907; that a tenant should be secured within the next 30 days; and that a special administrator should be appointed for that purpose and for the purpose of collecting rents and looking after the other property of said estate, to the end that said estate might be preserved for the best interests of all parties interested therein. The probate court granted the prayer of the petitioner, and appointed the petitioner, Maggie Welch, as such special administratrix. Defendant thereupon gave bond, duly qualified, and acted as such administratrix until the appointment of an executor, when she filed her report as such special administratrix, which, over the objection of Ann Mallon residuary legatee under the will, and W. F. Moran, executor, was approved, and the special administratrix discharged. Error proceedings were prosecuted to the district court by the objectors, where the rulings of the probate court were sustained, and its judgment affirmed. From such judgment of the district court, this appeal is prosecuted by the executor alone.

While numerous assignments of error are made by plaintiff, but two are insisted upon in his brief, viz.: (1) That the petition asking for the appointment of a special administrator failed to state a cause of action. (2) That the county court had no jurisdiction to appoint such special administratrix.

Plaintiff contends that the only authority a probate court has for the appointment of a special administrator is derived from section 5045, Ann. St. 1907, which is as follows: "When there shall be a delay in granting letters testamentary, or of administration, occasioned by an appeal from the allowance or disallowance of the will, or from any other cause, the judge of probate may appoint a special administrator to act in collecting and taking charge of the estate of the deceased, until the question on the allowance of the will, or such other question as shall oc-

casion the delay, shall be terminated, and an executor or administrator be thereupon appointed, and no appeal shall be allowed from the appointment of such special administration."

Plaintiff contends that this statute contemplates a delay occasioned by some action not provided for in the general statute; that there must be some delay caused by some action out of the ordinary; that it will not be sufficient to say that the appointment of the regular executor will be delayed on account of the time necessary for the service; that the petition in this case, excluding the conclusions, did not give the court jurisdiction to appoint a special administrator; that it showed on its face that the only delay would be delay necessary to secure service, which, he argues, is not sufficient. In this view of the statute we are unable to concur. We think the language of the section of the statute quoted, "or from any other cause," must be construed to mean that, whenever it appears to the probate court that for any cause the interests of the estate demand action by some one authorized to act prior to the time when letters testamentary can be issued and an executor appointed under the will of a deceased person, the probate court not only has the power, but it is its duty, to appoint such special administrator. In this case the petition showed that there was a tract of farm land, which is shown by the inventory to have been worth \$3,500, which had not been rented for the year 1907. It was then March 16, more than two weeks past the time when farm lands are ordinarily rented for the current year. Under the order of the court requiring three weeks' publication of notice of the petition for probate of the will, no executor could be appointed prior to the early part of April, a delay which would seriously interfere with the renting of the land for that year. This delay might deprive the estate of its entire income for a whole year from \$3,500 worth of real estate. It is clear that the action of the probate court in appointing the special administrator under those circumstances was not

Nelson v. Webster.

only within its jurisdiction, and not an abuse of discretion, but was the performance of a plain duty, and that the district court was right in affirming its action.

The judgment of the district court is

AFFIRMED.

CHARLES A. NELSON, APPELLEE, V. ORLANDO W. WEBSTER
ET AL., APPELLANTS.

FILED JANUARY 9, 1909. No. 15,438.

Brokers: VOID CONTRACT: QUANTUM MERUIT. Where a contract for the sale of real estate between the owner thereof and a broker employed to sell the same is void because not in writing, as required by section 10856, Ann. St. 1907, the broker cannot recover on a *quantum meruit* for services rendered in accordance with such contract, nor for the value of his time expended in that behalf. *Barney v. Lasbury*, 76 Neb. 701, followed.

APPEAL from the district court for Lancaster county:
ALBERT J. CORNISH, JUDGE. *Affirmed.*

Tibbets & Anderson, for appellants.

Burkett, Wilson & Brown, contra.

FAWCETT, J.

In 1904 plaintiff, who was the owner of the real estate known as 1010-1012 P street, in the city of Lincoln, requested defendants to find him a purchaser therefor. No agreement as to compensation or commission was made at the time, nor was any written contract ever entered into between plaintiff and defendants with respect to said employment. During the succeeding winter defendants were active in their efforts to secure a purchaser, and on April 19, 1905, succeeded in making a sale of the property for \$17,000, a price satisfactory to plaintiff. At the time of making the sale the purchaser gave defendants a check payable to their order for \$500, which check was shown

to plaintiff, but was retained by defendants, pending the final consummation of the deal. Defendants thereupon ordered an abstract of title, for which they paid \$8.50. They also assisted plaintiff in inducing a tenant, who was occupying the upper portion of said buildings, to vacate. They also took to themselves a \$3,000 mortgage outstanding against the property, in order to avoid any hitch in the consummation of the sale. On June 1 the sale was finally consummated, and the purchaser gave defendants another check payable to their order for \$16,500, being the balance of the purchase price. Defendants reimbursed themselves for the \$3,000 represented by the mortgage, and paid over the balance of the large check to plaintiff. Plaintiff then asked them to turn over to him the \$500 check, stating that he would give them his check for the amount of their commission, which he claimed they had agreed should be 1 per cent., or \$170. To this defendants objected, claiming that the contract was that, if the property sold for \$17,000, they were to receive the customary commission paid real estate agents in the city of Lincoln, viz., 5 per cent. on the first \$1,000, and 2½ per cent. on all in excess thereof, which in the present case would amount to \$450. Shortly thereafter defendants met plaintiff and his attorney in the office of plaintiff's attorney, and tendered them \$50 in gold, stating that it was "their money." Plaintiff, by the advice of his attorney, accepted the \$50. Plaintiff and his attorney both testified that, when they accepted the \$50, it was expressly understood that the acceptance of the same should not in any manner affect the rights of either party as to the \$450 in controversy. The testimony of defendants is to the effect that no such an understanding was had. Defendants still refusing to pay over the remaining \$450, this action was brought to recover the same. In the course of the trial, plaintiff's attorney made the following statement: "The plaintiff, without waiving any legal defenses that he may have, now offers to concede to the defendants that they may retain out of the \$450 in controversy \$170 for services in the sale of

the plaintiff's property, and \$8.50 by them claimed to have been paid for the extension of the abstract, and plaintiff now offers to take in full satisfaction of the claim set forth in his petition a judgment for the sum of \$271.50, with 7 per cent. interest thereon from the time of the commencement of this action, to wit, July 15, 1905." When both parties had rested, the court directed a verdict in favor of plaintiff for the said sum of \$271.50, with interest, amounting to \$303.16. From a judgment on the verdict so rendered, defendants prosecute this appeal. In their answer, as a second defense, defendants set out a counterclaim for services rendered in the sum of \$450, but in their testimony on the trial they admit that the services set out in their counterclaim are the same services which they set out in the first paragraph of their answer as a defense to plaintiff's action.

That defendants rendered plaintiff valuable services, for which they were morally entitled to be well paid, is beyond controversy, but there is no escape from the conclusion that this case falls squarely within section 10856, Ann. St. 1907, which provides: "Every contract for the sale of lands, between the owner thereof and any broker or agent employed to sell the same, shall be void, unless the contract is in writing and subscribed by the owner of the land and the broker or agent, and such contract shall describe the land to be sold, and set forth the compensation to be allowed by the owner in case of sale by the broker or agent." This section of the statute is set out and the authorities fully reviewed in *Barney v. Lasbury*, 76 Neb. 701. The syllabus in that case reads: "Where a contract for the sale of real estate between the owner thereof and a broker employed to sell the same is void because not in writing, as required by section 74, ch. 73, Comp. St. 1905, the broker cannot recover on a *quantum meruit* for services rendered in accordance with such contract, nor for the value of his time expended in that behalf." Our holding in that case is decisive of the case at bar.

Pike v. Hauptman.

The judgment of the district court is therefore

AFFIRMED.

ALBERT PIKE, APPELLEE, v. W. F. HAUPTMAN, APPELLANT.

FILED JANUARY 9, 1909. No. 15,392.

1. **Evidence on Former Trial: ABSENCE OF WITNESS.** Where it is apparent that the sheriff made an honest effort to serve a subpoena, and was unable to do so on account of the absence of the witness from the state, such information being given by those in a position to know, it is not error to allow the evidence of the absent witness given at a former trial of the case to be read to the jury; the party desiring the presence of such witness having taken timely steps to secure his attendance by compulsory process.
2. **Trial: OFFER OF PROOF.** No error is committed in rejecting an offer of proof not within the limits of the question on which the offer is based.
3. **Appeal: EXCEPTIONS.** In order to save a question for review in this court, an exception must be taken to the ruling of the trial court of which complaint is made.

APPEAL from the district court for Saline county:
LESLIE G. HURD, JUDGE. *Affirmed.*

Bartos & Bartos and Hall, Woods & Pound, for appellant.

Hazlett & Jack and Grimm & Grimm, contra.

DUFFIE, C.

Action upon a promissory note given in part payment for a team of horses. The defense was breach of warranty. A full statement of the issues made by the pleadings will be found in the opinion of Mr. Commissioner ALBERT, *Hauptman v. Pike*, 77 Neb. 105. Plaintiff recovered in the district court, and defendant has appealed.

The only errors alleged by appellant arise from a blemish upon one of the horses, which defendant claims was a

spavin. On the former trial one Ojers was a witness for the plaintiff. February 20, 1907, plaintiff caused a subpoena to issue for said Ojers, which was served by the sheriff by leaving a copy at the usual place of residence of said Ojers in Saline county. The sheriff's return shows that, after diligent search, he was unable to find Ojers in the county. The trial was commenced on the 26th day of February, 1907, and the sheriff testified that Ojers' wife informed him that Ojers was in the city of St. Joseph attending school, and was not expected to return for a period of three months. Thereupon the court admitted the evidence of Ojers given upon the first trial. The appellant alleges this as error. The subpoena with the return thereon shows due diligence on the part of the plaintiff in taking timely action to secure the attendance of Ojers as a witness. The testimony of the sheriff that he made inquiry from those who were presumably acquainted with the whereabouts of the witness ought, we think, to be satisfactory evidence that the attendance of the witness could not be secured, and the case differs materially in its facts from *Wittenberg v. Mollyncaux*, 59 Neb. 203, where the defendant apparently relied upon the promise of the witness to be present at the trial and who took no steps either to notify the witness of the time of the trial or to secure his attendance by legal process until the day before the trial, and after he had learned that the witness was absent from his home, when he secured a subpoena, knowing that service on the witness could not be procured. Abbott, Trial Brief, Mode of Proving Facts (2d ed.), p. 31; *Phelps v. Foot*, 1 Conn. 387.

The defendant introduced evidence tending to show that "spavined stock breeds from spavined stock" and that there is a hereditary predisposition to spavin. An expert witness called by the defendant testified that a spavined condition of the mare in question would deteriorate her value as a brood animal and was then asked if he could tell to what extent the spavined condition would affect her value for breeding purposes. He answered that he could.

The examiner then said to him: "You may now state." He answered: "On my part, I would consider her worthless. If we wish to breed sound horses, we must breed from sound horses. If we breed from spavined stock, we get spavined stock in most instances." Without any further question to the witness, the defendant then made the following offer: "The defendant now offers to prove by this witness that Mr. Chapman pointed out a sister of the mare in question, and upon examination he found that her hock joint was covered with spavin and was greatly inflamed, and that she was unsound from the same trouble as the mare in question now is." To which offer the court sustained an objection and excluded the testimony. This is now assigned as error. The rule appears to be that, unless there is pending a question to which the offer made is responsive, and objection to the question has been sustained by the court, an offer of proof should not be entertained by the court, and that sustaining an objection to such offer is not prejudicial error. In other words, an offer to prove facts wholly disconnected with any matter concerning which the witness has been questioned is not proper, and presents no question for review by the district court. *Dunphy v. Bartenbach*, 40 Neb. 143; *Perkins v. Tilton*, 53 Neb. 440; *Sellers v. Foster*, 27 Neb. 118; *Barr v. Post*, 56 Neb. 698.

The third error assigned is the refusal of the court to allow expert witnesses to testify with respect to the statements of standard text-writers on veterinarianian medicine as to what is spavin. It is conceded that *Van Skike v. Potter*, 53 Neb. 28, disapproves the custom of reading on evidence to the jury a scientific treatise written for a learned profession, but it is urged that a member of the profession ought to be allowed to fortify his opinion by showing that it is borne out by standard text-books upon the subject. Without expressing any opinion upon this subject, we are driven to the conclusion that the record does not fairly present the question. Aside from not being interrogated as to the definition of spavin given by

Heidemann v. Noxon.

the text-writers, no exception was taken to the ruling of the court sustaining an exception to the question which was asked, and the record therefore presents no question for review.

The last error assigned is in allowing a witness for the plaintiff to make a statement regarding his difficulties with the defendant in a matter wholly unconnected with the case. Relating to this, it is sufficient to say that upon cross-examination of the witness defendant's counsel asked him if he had not had difficulty with the defendant, and on re-examination the witness was requested to state the facts relating to the difficulty, which he did. We cannot see that this constitutes any reversible error.

We recommend an affirmance of the judgment.

EPPELSON, GOOD and CALKINS, CC., concur.

By the Court: For the reasons stated in the foregoing opinion the judgment of the district court is

AFFIRMED.

**AMELIA HEIDEMANN, APPELLEE, v. WILLIAM NOXON,
APPELLANT.**

FILED JANUARY 9, 1909. No. 15,419.

1. **Bastardy: WARRANT: ABATEMENT.** That a warrant issued for the arrest of the putative father of a bastard is not directed to the sheriff, coroner, or constable of the county is not a cause for abating the action in the district court where the question was not raised before the examining magistrate.
2. —: **CONTINUANCE: JURISDICTION.** The examining magistrate does not lose jurisdiction of the case by granting a continuance of the hearing on the request of the defendant.
3. **Appeal: EVIDENCE.** This court will not disturb a judgment based on conflicting evidence where the evidence sufficiently supports the judgment.

**APPEAL from the district court for Cass county: PAUL
J. SSEN, JUDGE. Affirmed.**

D. O. Dwyer, for appellant.

Byron Clark, contra.

DUFFIE, C.

On the 18th of December, 1906, the plaintiff filed an information, duly verified, before a justice of the peace of Cass county, alleging that she was an unmarried woman, and that in November, 1906, she was delivered of a bastard child of which defendant was the father. The justice thereupon issued a warrant for the defendant, and appointed Joseph Fitzgerald to serve the same. On the 19th of December, 1906, the defendant, who was a minor, together with his father, appeared before the justice and requested a continuance of the case until December 22. The continuance was granted upon the defendant entering into a recognizance in the sum of \$1,000 for his appearance on the date to which the case was continued. On the 22d of December the plaintiff appeared with her witnesses, and, the defendant failing to appear, the justice proceeded to examine the plaintiff, reducing said examination to writing, and from the evidence given found that her complaint had been established, and entered an order that the defendant enter into a recognizance in the sum of \$2,000 for his appearance at the next term of the district court for Cass county to answer such complaint and abide the order of that court. A transcript of these proceedings was duly filed in the district court, and at a term of said court held in February, 1907, the defendant appeared by his duly appointed guardian *ad litem*, and filed a plea to the jurisdiction of the court and to abate the action. The district court found against the defendant upon this plea, and upon a trial of the case on the merits found that the defendant was the father of the plaintiff's illegitimate child; that the reasonable value of the support of the said child was \$750, which should be paid to the plaintiff at the rate of \$15 a month, said payment to be made quarterly, and that he give security for the payment thereof. From this judgment plaintiff has appealed.

It is first urged that the court erred in overruling plaintiff's plea in abatement. It is insisted that our bastardy act provides for a special proceeding complete in itself, and that its provisions must be strictly followed. Section 1 of the act, being section 6300, Ann. St. 1907, provides that the justice before whom the information is filed shall issue a warrant "directed to the sheriff, coroner, or constable of any county of this state, commanding him forthwith to bring such accused person before said justice, to answer said complaint, and on return of such warrant the justice, in the presence of the accused person, shall examine the complainant under oath respecting the cause of her complaint, and such accused person shall be allowed to ask the complainant, when under oath, any question he may think necessary for his justification; all of which questions and answers, together with every other part of the examination, shall be reduced to writing by the justice of the peace." It is argued with great insistence that the proceeding had before the justice was without jurisdiction on account of the warrant being placed in the hands of Joseph Fitzgerald for serving, instead of one of the officers named in the statute. It is further insisted that the justice had no authority to continue the case and take a recognizance from the defendant for his appearance on the day for which the hearing was set, and that the hearing had in the absence of the defendant was illegal.

Relating to the first alleged error, we conclude from the evidence in the record that the appearance of the defendant before the justice was entirely voluntary. Mr. Fitzgerald testified that he had a conversation over the telephone with the defendant, whom it appears was under arrest in Kansas City under some other charge, and the defendant told him that he would accompany him back to Platts-mouth if he came after him. It further appears that the warrant was not served in Kansas City, and that the defendant voluntarily accompanied Fitzgerald back to

Plattsmouth, and on their arrival there the defendant was not placed under any restraint, was allowed full liberty of action, the only evidence of arrest being the return made upon the warrant when the parties appeared before the justice. If Fitzgerald had no authority to arrest the defendant, and if he did in fact arrest him and restrain him of his liberty (a matter which we do not determine), that question should have been raised before the justice, and not being raised, was waived.

Relating to the second point, it will be borne in mind that a suit against the putative father of a bastard is a civil action, and, while the court can enter no orders not warranted and authorized by the statute, it cannot be good law that the justice lost jurisdiction of the case by granting a continuance of the hearing on the defendant's own motion. It would be a singular rule which allows a defendant to take advantage of the order of a court made on his own request and apparently for his own benefit. By his appearance before the justice without objection, that court obtained jurisdiction of the case, and, the action being civil in its nature, the defendant cannot urge a want of jurisdiction because of his own failure to appear at the hearing on the day to which the case was continued on his own request. The court committed no error in finding against the defendant on his plea in abatement.

Relating to the merits of the case, the most that can be said is that the evidence was conflicting; but that it was sufficient to support the finding of the court is not a question open to discussion.

We recommend an affirmance of the judgment.

EPPERSON, GOOD and CALKINS, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

CHICAGO HOUSE WRECKING COMPANY, APPELLANT, v. CITY
OF OMAHA, APPELLEE.

FILED JANUARY 9, 1909. No. 15,427.

Taxation: Assessment. The deputy tax commissioners of the city of Omaha omitted to assess the plaintiff's property in the year 1899 for the tax levy of 1900. During the sitting of the board of review in December, 1899, this omission was discovered, and the board passed an order placing the omitted property on the assessment roll at a valuation of \$30,000. Thereupon the tax commissioner notified the plaintiff of the action of the board of review, stating in said notice that, if the plaintiff did not appear and show cause why the assessment should not be made, the same would stand as fixed by the board. *Held*, That, while the board of review had no authority to assess the plaintiff's property, the notice served upon the plaintiff by the tax commissioner indicated his intention to adopt the valuation made by the board unless a showing against such assessment should be made, and that his return of the assessment roll to the board of equalization on the third Monday of December with the plaintiff's property included therein at a valuation of \$30,000 was sufficient proof that the tax commissioner had adopted as his own the attempted assessment made by the board, and that such assessment, while irregular was not void.

APPEAL from the district court for Douglas county:
GEORGE A. DAY, JUDGE. *Affirmed*.

W. D. McHugh, for appellant.

H. E. Burnam, I. J. Dunn and John A. Rine, contra.

DUFFIE, C.

The plaintiff and appellant instituted this action to enjoin the collection and have adjudged void a certain personal property tax assessed and levied against its property by the defendant city for the year 1900. On the trial the district court dismissed the action, and the plaintiff has appealed.

Plaintiff is insistent in its contention that no assessment of its property was ever made by the tax commis-

sioner or any deputy tax commissioner for the year 1900. It asserts that the board of review of the city of Omaha made whatever assessment the tax sought to be enjoined is based upon. It is conceded that the board of review had no authority to assess the plaintiff's property, and that a tax levied against property without assessment in fact or in form is wholly illegal and void, and will be enjoined. The tax in question was levied while chapter 10, laws 1897, was in force. Section 13 of said chapter provides for the election of a tax commissioner in cities of a metropolitan class, and section 98 makes the tax commissioner the assessor of the city, and requires him to appoint deputies for the purpose of assessing the real and personal property within the corporate limits of the city subject to taxation. Section 138 requires the assessment to be made between the 15th day of September and the 15th day of November of each year, and complete return of such assessment to be made to the tax commissioner by his deputies on or before the 1st day of December of each year. It requires the deputy assessors to make a return to the tax commissioner at the end of each week, in order that he may review and correct the assessments made by them during such week. It also makes it the duty of the tax commissioner to add to the assessment made by his deputies any property subject to taxation which he may find they have omitted. The section further provides for a board of review composed of the tax commissioner and two resident freeholders of the city to be appointed by the mayor, and this board had power to review the assessments of all the real and personal property returned by the deputy assessors, "and to cause to be corrected all errors in the assessments so returned whether of undervaluation or excessive valuation." The board was to sit from the 15th of November to the 15th of December of each year. Section 141 of the act requires the tax commissioner to complete the assessment roll of the city on or before the 3d Tuesday of December, when the city council was to hold a session of not less

than five days as a board of equalization, giving the six days' notice thereof in the official papers of the city. The statute above referred to makes it plain that the assessment roll of the city was in the custody and under full control of the tax commissioner from the 15th of September until delivered to the city council on the third Tuesday of December, 1900, and that during all that time it was his duty to add to such roll any taxable property which had been omitted by his deputies.

The ground upon which the plaintiff seeks to avoid the tax in suit is that the assessment of its property was made by the board of review, and not by the tax commissioner or one of his deputies. The defendant introduced in evidence an order made in December, 1899, appearing on page 326 of the record kept by the board of review, in the following words: "It was ordered that the personal property of the Chicago House Wrecking Company be added to the assessment roll at the valuation of \$30,000, and that notice be served on said company to show cause why the assessment should not stand." The record further shows a notice served upon one of the officers or agents of the plaintiff as follows:

"Tax Department, City of Omaha. Omaha, Neb., 12-2, 1899. To: You are hereby notified that the personal property of the Chicago House Wrecking Company was omitted from the assessment roll and that the same has been added thereto by the board of review for assessment for the city taxes of the city of Omaha for the year 1900 at a valuation of \$30,000, and unless you appear before said board on or before December 15th and show cause why said assessment should not be made the same will stand as fixed by the board of review. Fred. J. Sackett, Tax Commissioner." This notice is signed by the tax commissioner, whose duty it was to assess the property omitted by his deputies. The notice is explicit in its terms that, unless the plaintiff appeared before the board of review and showed cause why the assessment should not be made, the same would stand as fixed by the board

of review. In other words the tax commissioner informed the plaintiff that, if there was no showing that the valuation fixed by the board of review was unfair or excessive, he would adopt such valuation as his own. That is the only reasonable construction which can be placed on the above notice in view of the tax commissioner's duty under the law. We know of no rule which prevents the tax commissioner or other assessing officers from advising with third parties relative to the valuation of taxable property within his jurisdiction, and, if the tax commissioner sought or obtained the opinion of the other members of the board of review in fixing a valuation upon the plaintiff's property, this could not have the effect of invalidating the assessment. Conceding, however, that the valuation placed upon the property was fixed by the board of review, the evidence is clear that the tax commissioner, by returning such assessment to the board of equalization, adopted as his own the amount fixed by the board of review as the taxable value of the property, and, as held in *South Platte Land Co. v. City of Crete*, 11 Neb. 344, a very similar case: "While the mode here adopted was not the one contemplated for fixing the value of property for the proposed levy, it was by no means void. In form, at least, it was correct, and, for aught that is shown, was entirely just and equitable to the plaintiff." Under this holding, the assessment placed upon the plaintiff's property having received the sanction of the tax commissioner cannot be said to be an absolutely void assessment.

It may be, and presumably was, the case that the board of review thought it a duty incumbent upon it to notify the owner of omitted property of any additions made to the assessment roll during the sitting of such board, as section 138 requires said board to notify owners of any increase in their assessment. That the board of review should construe this section as requiring them to notify the property owner of any addition made to the roll by the tax commissioner during the sitting of the board is not at all improbable. At any rate, the assessment placed

Burnham v. Chicago, B. & Q. R. Co.

upon the plaintiff's property received the sanction of the tax commissioner, whose duty it was to assess the same, and this, we think, a sufficient assessment and a sufficient compliance with the law.

No complaint is made that the assessment is too high or the tax levied for any illegal purpose. So far as the record discloses, the plaintiff is called upon to bear only its due proportion of the public burden, and we recommend an affirmance of the judgment.

EPPELSON, GOOD and CALKINS, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

HORACE E. BURNHAM, APPELLEE, v. CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY, APPELLANT.

FILED JANUARY 9, 1909. No. 15,367.

1. **Railroads: INCLOSURE OF RIGHT OF WAY.** A railroad company is not required to inclose that portion of its right of way, even outside of towns, villages and cities, and public highways, the inclosure of which by the construction of fences and cattle guards would be an increased danger to human life.
2. ———: **INJURY TO ANIMALS: DIRECTING VERDICT.** In an action charging a railroad company with failure to inclose its right of way, the defendant pleaded in excuse that to fence the same would unnecessarily endanger the lives of its employees. *Held*, That, as it plainly appeared from the evidence that the safety of the employees of the defendant company requires that the *locus in quo* remain uninclosed, the court should so declare, and withdraw consideration of the case from the jury.

APPEAL from the district court for Lancaster county:
ALBERT J. CORNISH, JUDGE. *Reversed*.

James E. Kelby, F. E. Bishop and Fred M. Deweese,
for appellant.

W. B. Comstock, contra.

EPPERSON, C.

On its Lincoln and Denver line of road, about two miles southwest of Lincoln, the defendant maintains a station called "Burnham," which is not an incorporated town, village or city. At this station defendant has its sheep yards, barns and pasture, where sheep in transit are unloaded and cared for. There are no general stock yards, depot buildings, elevators, corncribs or coal houses at or near this station. In the sheep yards there are at times from 20,000 to 30,000 sheep, and several hundred cars are there loaded and unloaded during the year. This traffic averages 10 cars a day, and during the busy season a great many more; the maximum as shown by the evidence, amounting to 125 cars. The plaintiff herein owned and occupied a small tract of land in the shape of a right-angle triangle in the northwest corner of the southeast quarter of section 4, about 1,700 feet southwest of defendant's sheep yards. The hypotenuse of plaintiff's lot was about 10 rods long and formed the boundary line between his lot and the northerly side of defendant's right of way. The defendant's railway at this point runs in a northeasterly and southwesterly direction. This main track is in the center of its right of way, and 100 feet from the plaintiff's lot. The defendant has constructed and operates a side-track on the north side of its main track for the purpose of reaching the sheep barns, and connected the same with its main track by switches, one of which is at a point about 100 feet southwest of the intersection of the railroad with the south line of a public highway running east and west along the north side of plaintiff's property, and is therefore 100 feet from the plaintiff's land. About 12 years ago defendant constructed a fence along the line between its right of way and the plaintiff's property, which was later abandoned. The plaintiff, joining his lines of fence with the abandoned fence of the defendant, made an inclosure, and turned his horses therein. On July 5, 1906, one of plaintiff's horses escaped from the

lot by breaking through the abandoned fence, got upon the defendant's track at or near the switch, and there was struck and killed by one of defendant's trains. The plaintiff brought this action to recover the value of the horse, alleging negligence on the part of the defendant in not fencing its right of way. Defendant admitted that its right of way was not fenced at this point, and alleged that its tracks and grounds at the place in question were not such as could be lawfully inclosed with fences and cattle-guards; that to so inclose them would greatly hinder and obstruct the operation of trains, and unnecessarily endanger the lives of its employees. Upon trial the court submitted to the jury the issue thus presented by defendant's answer. This is assigned as error by the defendant on an appeal from an adverse judgment below.

The statute requires each railroad company to erect and maintain fences on the sides of its right of way sufficient to prevent cattle, horses, sheep and hogs from getting on the railroad, except at the crossings of public highways and within the limits of towns, cities and villages, and requires it to maintain cattle-guards at all road crossings sufficient to prevent cattle, horses, sheep and hogs from getting upon the railroad, and, for a neglect of this duty, the railroad company is made liable in damages for stock killed or injured thereby. A liberal construction has been placed upon this statute in cases where the fencing of the right of way at the place of the accident would render railroad facilities inconvenient to the public or dangerous to human life. *Chicago, B. & Q. R. Co. v. Hogan*, 27 Neb. 801, 30 Neb. 686; *Chicago, B. & Q. R. Co. v. Sevcek*, 72 Neb. 793, 799. Manifestly the inclosure of the right of way at stations, although not within a platted or an incorporated town, city or village would be an inconvenience to the public. For this reason, a liberal construction is given to the statute in the cases above cited. Each of the above cases pertain to the liability of the company for the killing of live stock at such stations; but they recognize, also, that the company is excused from

fencing if the inclosure would necessarily render the service of employees more hazardous. The station here in controversy is not one established for the accommodation of the people in its vicinity; but it is, nevertheless, a necessary station, and one constructed for the proper care of live stock shipped over the defendant's line of road, and is needed for the proper expedition of its business. The volume of business done here and the amount of switching probably far exceeds that of any one country station in this state. Therefore with greater reason can it be said that the railroad company should be excused from inclosing its right of way. The evidence shows that the switch in controversy is in frequent daily use, and, although the inclosing of the right of way at the place where this switch is maintained would be of no inconvenience to the public, it would, nevertheless, be an increased danger to defendant's employees engaged in switching trains to and from the main line and side-track. It would be necessary for the inclosing of the right of way at this place to construct a lateral fence along the public highway and construct a cattle-guard within the rails of both the main and side-tracks at a point but 100 feet from the switch. The evidence shows that such a construction so near the switch would be an increased danger to defendants' employees engaged in transferring cars. That such a construction at a place frequently used for switching cars is an increased danger is well known, and would be recognized as such by the courts in the absence of specific evidence. The inquiry, therefore, should be as to the use of that part of the right of way and tracks. The court should ascertain whether or not the manipulation of trains or cars at the *locus in quo* is frequent and necessary. If this is admitted or proved, it necessarily follows that the establishment of wing-fences and cattle-guards would be an additional danger to trainmen. Under such circumstances, a railroad company is not only excused from inclosing its right of way, but it is its duty not to do so. The danger to live

stock should not be obviated, if by so doing human life is endangered.

Our decision depends upon whether or not it was for the jury to say that the defendant was guilty of wrongdoing in its failure to inclose its right of way. In *Chicago, B. & Q. R. Co. v. Seveck*, 72 Neb. 799, it is said: "If it plainly appear from the evidence that the locality is one where the proper conduct of the business, considering both public convenience and the operation of the railroad with regard to the safety of the employees, requires that it be left unfenced, then the court may so declare; but where the question is one of doubt it is for the jury." In *Grondin v. Duluth, S. S. & A. R. Co.*, 100 Mich. 598, it was held as a matter of law "that at least as much of the track and grounds outside of the switches as is required and is in actual use for reaching these side-tracks is a part of the station grounds, to which the statutory requirement to fence does not apply." In *Rabidon v. Chicago & W. M. R. Co.*, 115 Mich. 390, it was held that the defendant conclusively established that the place was within the yard limits, and exempt from fencing. The judgment of the lower court was reversed because the case was submitted to the jury. That case is very similar to the one at bar so far as it relates to the use by the railroad company of the switch in controversy. In *Cole v. Duluth, S. S. & A. R. Co.*, 104 Wis. 460, it is said: "Where the grounds left unfenced and treated by a railway company as depot grounds are unusually extensive and the *locus in quo* is outside of and beyond the switches and side-tracks, and is not used as a place of access by the public or patrons, either for freight or passengers, and only for the passing or standing of trains, the question whether it is necessary for and used as depot grounds is properly for the jury."

Adhering to the rule last announced, this court decided *Rosenberg v. Chicago, B. & Q. R. Co.*, 77 Neb. 663. It was there held that the trial court erred in withdrawing the case from the jury. That case may be distinguished from this, for it appears that there the rail-

Burnham v. Chicago, B. & Q. R. Co.

road company had not fenced within a quarter of a mile of the switch limits, and about half a mile from the place where the animals were killed. The facts in that case were such that reasonable minds might differ as to the defendant's obligation to inclose the right of way at the place where the cattle entered the right of way. In the case at bar it does not seem possible that reasonable minds can differ as to the defendants' duty in this regard. In attending to the duties of switching, trainmen are required to step between the cars along the train at and near the switch, and are frequently required to be in close proximity to or even jumping to and from moving trains, or to ride upon the sides thereof. In the performance of these duties both night and day, the existence of cattle-guards and fences is a continuous increased danger, which it is the duty of the railroad company to avoid. In 3 Elliott, Railroads (2d ed.), sec. 1194, it is said: "The exemption of switch grounds is founded on the danger to employees which would necessarily result were the tracks fenced. The safety of the employees at points where they almost continually pass up and down the track in the performance of their duties is far more important than would be the safety afforded to animals and property from the erection of fences at such tracks." In the case at bar it appears that not only would trainmen be endangered, but, also, that shippers accompanying their sheep would probably encounter the same dangers as do the trainmen in and about the *locus in quo*. Undoubtedly the jury should be permitted to decide the reasonableness or unreasonableness of such excuses pleaded by a railroad company, where the evidence leaves a doubt as to the dangerous character of such improvements, or in any case where the place in controversy is near a switch of occasional use only, or at a siding used infrequently, and not at the centers of active commercial industry. But such is not the character of the evidence in this case. The switch in controversy is not one established for the occasional use of the defendant in permitting its trains to

pass, but one which is in continuous daily use of the company in the transferring of sheep to and from its yards, and, under these circumstances, the facts being established by uncontradicted evidence, it was the duty of the court to withdraw the consideration of this question from the jury, and to direct a verdict for the defendant as requested.

We recommend that the judgment of the district court be reversed and this cause remanded for further proceedings.

DUFFIE and GOOD, CC., concur.

By the Court: For the reasons given in the foregoing opinion, the judgment of the district court is reversed and this cause remanded for further proceedings.

REVERSED.

ROSE and DEAN, JJ., not sitting.

LETTON, J., concurring.

I concur in the opinion for the reason that to hold otherwise at this time would be to change the law which has been in force in this state since the case of *Chicago, B. & Q. R. Co. v. Hogan*, 30 Neb. 686. In that case it appeared that, if that portion of the depot grounds not within the city limits had been fenced, it would have required the construction of cattle-guards and wing-fences across the track. It was stipulated in that case that it would be unsafe to the railroad employees if cattle-guards and fences were erected. To quote from the opinion: "It is stipulated by the parties that it would be inconvenient and unsafe to employees of the road if cattle-guards and fences were erected there. Such guards within station grounds could not be otherwise than exceedingly dangerous to those whose duty it is to attend to the switching of cars. This work of necessity is done at stations, and freight cars must be coupled and uncoupled by a person standing on the ground. To perform such labor with cattle-guards constructed across the tracks, within station

grounds, would not only be perilous to the life and limb of the employees, but would greatly interfere with the proper discharge of its duties as a carrier." While Burnham is not a passenger station, it is a station for loading and unloading live stock, and much more switching is done there than at many regular stations, and it is the undisputed evidence that the placing of the required cattle-guards would be dangerous to the men employed in the necessary switching operations. If this were a new question, I would be in favor of holding strictly to the letter of the statute and leaving its amendment to the legislature, for a defective law is usually speedily amended if enforced in all its strictness, but, since the law of the *Hogan* case has been followed, and since this construction is in favor of life and limb, I do not think it well to depart from the established rule.

In my judgment the whole matter of relieving railroad companies from the statutory duty to fence at points outside of towns, cities and villages, where fencing would interfere with the convenience of the public or the proper operation of the railroad with regard to the safety of its employees and the public generally, should be committed by the legislature to the discretion and supervision of the state board of railway commissioners, who are much better fitted to determine the need of such relief than the courts are, and should not be left to be determined by the courts after accidents have happened.

REESE, C. J., dissenting.

I cannot agree to the holding in this case. It is provided in section 1, art. I, ch. 72, Comp. St. 1907, that railroad corporations shall erect and maintain fences on the sides of their railroads, "suitable and amply sufficient to prevent cattle, horses, sheep, and hogs from getting on the said railroad, except at the crossings of public roads and highways, and within the limits of towns, cities, and villages, * * * and when such fences, * * * or any part thereof, are not in sufficiently good repair to

accomplish the object for which the same is herein prescribed, is intended, such railroad corporation and its agents shall be liable for any and all damages which shall be done by the agents, engines, or trains of any such corporation." It is provided by section 2 of the same act, that, in case of failure to fence as required in the first section, the company "shall be absolutely liable to the owner of any live stock injured, killed, or destroyed." The language of these sections could not well be made any stronger or more definite. There are two exceptions, and only two, in the act. The railroad company is exempted from liability only at the crossings of public roads and highways, and within the limits of towns, cities, and villages. In all other cases the companies are liable for the value of live stock killed upon their tracks. It is conceded that the place where plaintiff's horse was killed does not come within either one of the exceptions. Then what legal right or authority have the courts to read into the act any other exception? I know of none. Courts are not established for the purpose of amending or explaining away any part of a valid law enacted by the law making power, which is the supreme power of the state. The case of *Chicago, B. & Q. R. Co. v. Hogan*, 27 Neb. 801, on rehearing, 30 Neb. 686, is not in point, for the court held that the place where the animal was killed was within one of the exceptions prescribed by the statute. *Chicago, B. & Q. R. Co. v. Screeck*, 72 Neb. 793, on rehearing, 72 Neb. 799, goes to the limit, the opinion being based largely upon the question of the convenience of the public in having access to the station. In this case the public has no possible interest in the existence or nonexistence of the fence, so far as the public convenience is concerned, and the fence could not interfere with the operation of defendant's trains, nor the safety of human life. I very much doubt if the safety of defendant's employees could be taken into consideration in any event, as the act referred to makes no such exception. Then, again, to say that the companies may create a "danger point" at any

place on the line of their railroad and thus set aside the statute at their own pleasure was never intended by the legislature.

There is another reason why I think this decision is wrong. The record shows beyond all question that defendant had its road fenced at the point where the horse was killed but had not kept its fence "in sufficiently good repair" to prevent live stock from going upon its tracks. The fence, standing, as it was, on the line of the right of way, was equivalent to a representation that it would be maintained, and to an invitation to plaintiff to join his fence to it, and that it would be adequate to turn stock. Plaintiff joined his fence to that of defendant, and placed his horses within the inclosure. There is no evidence in the record tending to show that any objection to this was ever made by defendant, or any suggestion that it was its purpose to allow the fence to become insecure.

While no error is shown by the record to the prejudice or disadvantage of defendant, yet I think the court erred in submitting the whole question to the jury. To my mind the only question was: "Did the evidence show that the place where plaintiff's horse was killed came within any of the exceptions contained in the statute?" If not, plaintiff was entitled to recover the value of the horse killed. The proofs all showed that it did not. No one claimed otherwise. This being true, by the plain and unequivocal language of the statute, plaintiff was entitled to a judgment for the value of the horse. There is no question here as to what the statute ought to be. Courts should only inquire as to what it is. The fact that a statute, if otherwise valid, is more strict in its provisions than the court may think it should have been, furnishes no authority for the avoidance of its terms, or otherwise changing it, but all courts should be governed by it. The changes, limitations, and exceptions are for the legislature. I am unable to see any reason why the judgment should not be affirmed.

J. D. STIRES V. FIRST NATIONAL BANK OF COLUMBUS, APPELLANT; COLUMBUS STATE BANK, APPELLEE.

FILED JANUARY 9, 1909. No. 15,411.

1. **Bankruptcy: CONTRACT BETWEEN CREDITORS: ASSIGNMENT OF DIVIDENDS.** A contract between two creditors of a common debtor, wherein one agrees that a debt owing to a third creditor may be preferred by the debtor, if purchased by the other contracting creditor, does not amount to an assignment of the first party's debt, nor of dividends declared thereon in subsequent bankruptcy proceedings.
2. ———: **DIVIDENDS.** A note pledged by a third party as security for the payment of a debt stands in the position of a surety for the payment of the principal debt, and funds paid upon the pledged note will be applied upon the debt secured.

APPEAL from the district court for Platte county: **CONRAD HOLLENBECK, JUDGE.** *Reversed with directions.*

Albert & Wagner and Edson Rich, for appellant.

A. M. Post and J. D. Stires, contra.

EPPERSON, C.

The parties to this appeal are interpleaders in an action instituted in the court below by J. D. Stires, trustee in bankruptcy of the estate of Garrett Hulst. The funds in controversy are dividends which the trustee has collected, and which were declared upon the claim of the appellant as a creditor of the bankrupt. The material facts may be stated in substance as follows: On June 15, 1904, Garrett Hulst was in the merchandise business in Columbus, and owned a large stock of goods. His four principal creditors, and the amounts owing to each on their respective notes, as subsequently allowed, are as follows: The Hundley Smith Dry Goods Company, \$11,560.41; First National Bank of Columbus, \$7,130.50; Columbus State Bank, \$10,995.98; and Lucy Hulst, \$12,-

724. Early in 1904 Lucy Hulst, who is the mother of the bankrupt, pledged her note to the Hundley Smith company as security for its indebtedness against Hulst. On June 15, 1904, the Hundley Smith company was pressing its claim and threatening to institute bankruptcy proceedings to enforce its payment. The two banks, in order to prevent such proceedings, entered into a written agreement of which the following is a copy: "In consideration of the purchase by the undersigned, the Columbus State Bank, of a certain note and account owing by Garrett Hulst to the Hundley Smith Dry Goods Company, amounting in the aggregate to the sum of \$11,160.47, exclusive of interest, and the extension of time for payment of said claim and any and all other indebtedness owing by said Hulst to said bank, to the end that said Hulst may continue his business and avoid the cost to all creditors which would follow the institution of proceedings in bankruptcy against said Hulst now threatened by said Hundley Smith Dry Goods Company, the undersigned, the First National Bank of Columbus, hereby agrees that all money, the proceeds of the business of said Hulst, less necessary expenses and money owing by him for goods heretofore purchased and such as may hereafter be necessary to supply current needs, shall be paid by said Hulst to the Columbus State Bank and credited by it upon the debt so purchased from the Hundley Smith Dry Goods Company until payment of such debt in full, and upon payment of the debt last above mentioned the money applicable upon the claims of either party hereto shall be applied *pro rata* upon the respective claims of the respective banks and of Mrs. Lucy Hulst." Hulst consented to the arrangements thus made by the banks. The State bank paid the claim of the Hundley Smith company, and received an assignment thereof, together with the Lucy Hulst note. Soon after the execution of the above agreement by the banks, Hulst assigned to the State bank certain book accounts, and Lucy Hulst made an assignment to the State bank of her note against Hulst, pledging the

same again as security for the debt assigned to said bank by the Hundley Smith company, and further pledged the same to secure the original indebtedness owing by Hulst to said bank. Hulst did not pay any part of the Hundley Smith claim. In October following Hulst was declared a bankrupt, and his estate has been fully administered by the trustee. In the bankruptcy court the National bank filed its claim, and the State bank its original claim, also the note bought of Hundley Smith company, and the pledged note of Lucy Hulst. All these claims were allowed as liabilities of the estate. The trustee realized 42.36 per cent. of the indebtedness. *Prima facie* the National bank is entitled to the dividends, amounting to \$3,020.49, payable upon its note. The State bank contends that, under and by virtue of the above contract, it is entitled to apply the dividends declared upon the National bank's note to the payment of the claim bought of the Hundley Smith company, or so much thereof as will be sufficient, with the dividends declared upon the Hundley Smith claim itself and the original claim of the State bank, to satisfy it; and, further, that the dividends upon the Lucy Hulst note are not applicable upon the Hundley Smith claim. The lower court found for the State bank, and the National bank appeals.

Appellee's argument does not appeal to us as a proper disposition of this case. Appellant did not by the contract assign or pledge its note to the appellee, nor the dividends which might thereafter be declared in the bankruptcy proceedings. At most the contract was only an agreement on the part of the appellant that the debtor Hulst might prefer the claim assigned to the appellee by the Hundley Smith company, or that from the proceeds of Hulst's business that claim should be first paid. The contract was not made in contemplation of Hulst's bankruptcy, but quite the contrary. It contemplated that bankruptcy proceedings should not be instituted, and that Hulst would be able to pay out if not pressed by the Hundley Smith company. Lucy Hulst had no property

Stires v. First Nat. Bank of Columbus.

except her son's note. It was not desirable security except in the event that it should become collectible. The contract contemplated that the indebtedness owing to the Hundley Smith company should be paid before any of the funds apparently available should be paid to any of the other three principal creditors. The Lucy Hulst note stood pledged as security for the Hundley Smith claim, and by the assignment of that claim to the appellee it became a security in the hands of the latter for the payment of the Hundley Smith note. It is immaterial, so far as our inquiry is concerned, that it was later pledged also as security for the original claim of the appellee. When the contract was made, the Lucy Hulst note was apparently without value as security, but, when any amount thereof became collectible, it was of value, and the amount paid thereon was applicable upon the debt which it was first pledged to secure. The appellant, by agreeing that the Hundley Smith claim should be preferred, became interested in seeing that all funds available for its payment were applied thereon.

The appellee asserts as the essential provision of the contract that portion thereof which provides that, upon the payment of the Hundley Smith claim, "the money applicable upon the claim of either party hereto shall be applied *pro rata* upon the respective claims of the respective banks and of Mrs. Lucy Hulst." The lower court found that after the payment of the Hundley Smith claim the amount of dividends declared upon the claim of the National bank and the original claim of the State bank should be paid *pro rata* upon these two debts and the note of Lucy Hulst, and this without regard to the dividends payable upon the Lucy Hulst note. We cannot find any law, equity or justice in such a distribution. The contract did not release Hulst nor his bankrupt estate from paying the Lucy Hulst note. It did not release it as security for the payment of the Hundley Smith claim. Although the contract did not contemplate that the Lucy Hulst note would be paid until after the terms

of the contract had been complied with, yet it did not stipulate to the contrary. It is apparent that the banks intended by this clause of their contract that neither should attempt to procure a preference over the other or over Lucy Hulst, but that the funds available, after the payment of the Hundley Smith claim, should be paid *pro rata* upon the three remaining principal claims. Had the Hundley Smith claim been secured by collateral not pertaining to Hulst's business, it could not be said that the State bank could discard the same, or appropriate it to the payment of other indebtedness simply because the contract contemplated that the principal indebtedness would be paid by the principal debtor, and that occasion would not require the enforcing of the securities. Parties are entitled to all the benefits of their contract although, when made, they were apparently of little or no value. The contract entered into was made with reference to the fact that the Lucy Hulst note was pledged as security for the Hundley Smith claim, and the parties are entitled to the benefits derived from such security. To permit the State bank to apply the proceeds thereof upon their original indebtedness by reason of the subsequent pledge therefor would be to enforce against the National bank a contract to which it was not a party.

As contended for by appellant, the Lucy Hulst note stood in the position of surety for the payment of the Hundley Smith claim, and as such the dividends paid thereon must be applied. But appellee contends that appellant is foreclosed of this contention because inconsistent with its answer in the court below. There appellant did allege that the contract was rendered inoperative by reason of Hulst's disposition of his business and subsequent bankruptcy. Possibly the case might well be disposed of along the line suggested by the answer, but we do not so decide. The facts were set forth in the pleadings, and the appellant claimed the amount declared as a dividend upon its note. *Prima facie* it was entitled to it. Under these circumstances, inconsistency in pleading or a

Smith v. Union P. R. Co.

change of theories is not very damaging. Appellee must rely upon the strength of his own case, and not upon the inconsistencies of an adversary so strongly fortified.

The amount collected by the State bank from the book accounts, and the dividends upon the Hundley Smith and Lucy Hulst notes, were sufficient to pay the Hundley Smith claim in full. With this appellee must rest content.

We recommend that the judgment of the lower court be reversed and this cause remanded that judgment may be entered conforming to this opinion.

DUFFIE and GOOD, CC., concur.

By the Court: For the reasons given in the foregoing opinion, this cause is reversed and remanded, with instructions to the lower court to enter judgment conforming thereto.

JUDGMENT ACCORDINGLY.

MARY SMITH, ADMINISTRATRIX, APPELLANT, v. UNION
PACIFIC RAILROAD COMPANY, APPELLEE.

FILED JANUARY 9, 1909. No. 15,397.

Railroads: INJURY TO PERSONS: CONTRIBUTORY NEGLIGENCE. Defendant in error's intestate, while driving on the public road, parallel with the railroad track of the plaintiff in error, upon a moonlight night, left the public road and went diagonally toward the railroad track, and over the side of a cut, where he, with his wagon box and a load of lumber, were thrown upon the track. A train soon after struck the obstruction, and he was afterwards found mangled upon the track. There is no evidence indicating that his team ran away or became unmanageable, but the evidence shows that he was much intoxicated a short time before the accident. *Held*, That the deceased was guilty of such contributory negligence as to preclude a recovery, though the railroad was not fenced at the locality of the accident, as by law it was required to be. *Union P. R. Co. v. Smith*, 5 Neb. (Unof.) 631, followed and approved.

APPEAL from the district court for Greeley county:
JAMES N. PAUL, JUDGE. *Affirmed.*

Tibbets & Anderson and *J. R. Swain*, for appellant.

Edson Rich and *J. E. Rait*, *contra.*

GOOD, C.

Mary Smith, as administratrix of the estate of Michael Smith, deceased, brought this action against the Union Pacific Railroad Company to recover damages for negligently causing the death of her intestate. The defendant denied negligence on its part, and pleaded contributory negligence on the part of the plaintiff's intestate. At the conclusion of the evidence the court directed a verdict for defendant. Plaintiff has appealed.

At a former trial of this cause in the district court plaintiff recovered a judgment against defendant, which was reversed by this court. See *Union P. R. Co. v. Smith*, 5 Neb. (Unof.) 631. After the cause was remanded to the district court a second trial was had upon the same issues and upon substantially the same evidence as was adduced upon the first trial. A full statement of the issues and facts disclosed by the record may be found in the former opinion, and will not be repeated here. The only additional evidence adduced upon the second trial was that of plaintiff, who testified that the night on which the accident occurred was cloudy and dark, and that there were three tracks in the public highway which ran parallel to defendant's line of railroad near the place where the accident occurred, and that one of these tracks, which was used in muddy weather, ran quite close to defendant's railroad track. We have carefully read and examined all of the evidence in the record. The testimony of the plaintiff that the night was dark was general in its nature and would not refer to any particular hour of the evening. The evidence was not at all inconsistent with

the evidence adduced at the former trial. It was there shown that it was quite dark in the early part of the evening before the moon had risen. It was clearly shown, however beyond question that at the time the accident occurred the moon had risen and that it was sufficiently light for those who met and passed Mr. Smith upon the highway to recognize him, and further shows that it was sufficiently light immediately after the accident for persons to see and trace the wagon tracks where it had left the highway, and trace them to the point where the accident occurred. The testimony further shows that at the time of the accident plaintiff was several miles distant, and she would not therefore have determined the condition of darkness or light at the place of the accident. Plaintiff's own testimony shows that at the time of the accident there was but one beaten track in the highway which was used, and that the beaten track was on a portion of the highway that was graded up. Plaintiff's own evidence, therefore, adds nothing materially to the facts disclosed by the record upon the former trial. The record discloses that plaintiff's intestate had frequently driven over the highway for the past 26 years and that he was very familiar with it. Under the evidence and the circumstances disclosed by the record, the conclusion appears irresistible that plaintiff's intestate was guilty of contributory negligence in turning from the highway and driving over an embankment onto or near the defendant's railroad track, and but for his own negligence the injury could not have happened. The present case made is in no respect different from that presented when the case was first before this court. Upon the authority of the former opinion, plaintiff was not entitled to a judgment. The district court properly directed a verdict for the defendant.

The judgment should be affirmed.

DUFFIE and EPPERSON, CC., concur.

McCarn v. London.

By the Court: For the reasons given in the foregoing opinion, the judgment of the district court is

AFFIRMED.

NANETTE E. MCCARN, APPELLEE, v. ESTHER LONDON,
APPELLANT.

FILED JANUARY 9, 1909. No. 15,416.

Statute of Frauds: SALE OF REAL ESTATE: MEMORANDUM. Where the owner of an entire city lot signs a written memorandum of sale in which the property is described as the north — feet of such lot, the memorandum is insufficient under the statute of frauds, and a specific performance thereof will not be enforced.

APPEAL from the district court for Dodge county:
CONRAD HOLLENBECK, JUDGE. *Affirmed.*

F. W. Button, for appellant.

Frank Dolezal, *contra*.

CALKINS, C.

On the 21st day of March, 1907, the plaintiff, being the owner of certain property in the city of Fremont, described as lot 8, in block 182, made a writing in the words and figures following: "Fremont, Nebraska, March 21, 1907. Received of Esther London fifty dollars (\$50) to apply on payment on sale of the north feet of Lot No. 8, Blk. No. 182. Esther London agrees to pay for this property \$1,250 in all, \$550 cash June 15, '07, \$600 cash Aug. 1st 1907, with 6 per cent. interest from April 21, '07 when Esther London is to get possession. Nanette E. McCarn." Afterwards she brought this action to quiet title against the defendant, who, it was alleged, claimed to own a portion of said lot 8 by virtue of the writing above quoted. The defendant filed a pleading denominated an answer and cross-petition, in which she alleged

that said lot 8 was in dimension 66 feet east and west and 132 feet north and south, and was bounded by C street on the east and Second street on the south; that there were upon this lot three houses all facing east, and with each house there had been kept certain definite separate parts of said lot; that the portion of the lot occupied with the north house was 28 feet north and south, and that this was marked by the placing of a coal house used in connection with the north house in the rear and to the south thereof, and by placing a privy appurtenant to the middle house to the rear and north thereof and adjoining the coal house; that the plaintiff and defendant had a definite understanding that this north 28 feet was the property being sold, but at the time did not know the frontage thereof in feet, and that it was agreed that the number of feet might be ascertained by measurement and thereafter inserted in the contract. The answer also contained suitable allegations of readiness on the part of the defendant to fulfil such contract and prayed that the plaintiff be compelled to specifically perform the same. To this answer the plaintiff filed a demurrer, which was sustained; and, judgment being rendered for the plaintiff, the defendant appeals.

It is conceded that the only question presented by this appeal is the sufficiency of the above writing under the statute of frauds. It is a general rule that the description of land in a memorandum of a contract for the sale thereof must be sufficiently definite to identify the land by its own terms or by reference to external standards in existence at the time of the making of the contract, and capable of being determined beyond dispute. 20 Cyc. 270. The connection between the signed paper and the external standards cannot be made by parol. It must appear or be reasonably inferred from the writing itself. *Johnson & Miller v. Buck*, 35 N. J. Law, 338. In this case the contract fails to identify the property, and there is no reference to any external standard. The only way to ascertain what was in the minds of the contracting parties is to re-

sort to parol testimony of what was said between them, which would in effect nullify the statute requiring the contract to be in writing.

The defendant places stress upon the use of the words "this property" in the memorandum. The word "this" may be used to refer to something mentioned or about to be mentioned; but, where there is nothing elsewhere in the writing to which it can refer, it does not in any way supply the lack of such mention.

The defendant cites the case of *Ruzicka v. Hotovy*, 72 Neb. 589. In this case the vendor owned the southeast quarter of section 7, and the memorandum did not specify which quarter in the section named was to be sold. A reference to the records disclosed the fact that the vendor owned but one quarter in this section, and the contract in that case was held to mean the quarter owned by such vendor. If in this case the vendor had owned one-third of the lot mentioned, and the memorandum had described one-third of said lot without further specifying the property to be sold, we might, under the authority of *Ruzicka v. Hotovy*, *supra*, go to the record, and, having ascertained that the plaintiff owned but one-third of such lot, declare that her intention to sell that third sufficiently appeared from the contract. But no such certainty could be attained by an examination of the record of the title of this lot. Any determination of the number of feet of frontage intended to be sold must rest upon parol testimony unsupported by the writing or any legitimate inference to be drawn therefrom. The case cited does not apply.

We therefore recommend that the judgment of the district court be affirmed.

DUFFIE, EPPERSON and GOOD, CC., concur.

By the Court: For the reasons stated in the foregoing opinion the judgment of the district court is

AFFIRMED.

DEAN, J., not sitting.

**FRED GORDER & SON, APPELLEE, v. HERMAN E. PANKONIN,
APPELLANT.**

FILED JANUARY 9, 1909. No. 15,418.

1. **Specific Performance: RENEWAL OF LEASE: DESCRIPTION OF PROPERTY.** In an action brought to compel the specific performance of a covenant to renew a lease, the fact that the description of the property in the lease is indefinite will not defeat the plaintiff's right to have the same specifically performed, where it appears that both parties have, without question, acted under said lease, the defendant surrendering, and the plaintiffs accepting, certain specified property as being the property described in said lease.
2. **Partnership: NEW PARTNER.** While the sale of his interest to a stranger by one member of a partnership does not make such stranger a member of the firm, there is no rule of law forbidding all the members of a firm from agreeing to admit a new member as a partner therein.
3. **Statute of Frauds: PARTNERSHIP: NEW PARTNER.** Where by agreement between all the partners a new member is admitted to the firm, he acquires an interest in the partnership property by operation of law; and such transfer is not within the statute of frauds.
4. **Specific Performance: LEASE: RENEWAL BY PARTNERSHIP.** In an action by a partnership for the specific performance of a covenant to renew a five-year lease, it is immaterial that at certain times during the first term of said lease other persons held an interest in said partnership, where the persons who constituted the partnership at the time of demanding such renewal are the same persons who were members of the firm at the time of the execution of the lease.
5. **Estoppel: LEASE: ACCEPTANCE OF BENEFITS.** Where a lessor has accepted the benefits of a lease made by him to a partnership, he cannot, in an action by such partnership to enforce the specific performance of a covenant to renew, plead that the partnership was without capacity to take the legal title to real estate.
6. **Specific Performance: REMEDY AT LAW.** Where a plaintiff purchases a stock of goods and the good will of a business, at the same time taking a lease of the premises in which said business has been carried on, for a term of years, with an option to renew

Gorder & Son v. Pankonin.

at the end of said term, he is not confined to an action at law for damages in case of the landlord's refusal to fulfil the covenant to renew, but may maintain an action in equity for the specific performance of such covenant.

APPEAL from the district court for Cass county: PAUL JESSEN, JUDGE. *Affirmed.*

D. O. Dwyer and A. L. Tidd, for appellant.

Byron Clark, contra.

CALKINS, C.

The defendant was a dealer in implements and harness in the village of Louisville. He occupied a store upon lots numbered 262 and 263, and had warehouses and buildings on lots 293 and 294. On the 13th day of February, 1901, he entered into a contract to sell to the firm of Fred Gorder & Son his stock of goods, excepting only pumps and windmills, and to rent the buildings upon said lots 262 and 263, together with all warerooms occupied for storage purposes, reserving an office room in the main building. The rent was to be \$22 a month for a term of one year, with the privilege of five years or more. The vendor further agreed not to engage in the implement or harness business in Louisville so long as the vendee should rent said property. On the 15th day of February the parties entered into a more formal lease, for a term of five years from February 20, with an option to the lessees to, at the end of such term, renew for a period of one year or more up to five years. In this lease the property was again described as lots 262 and 263, with all the buildings, warehouses and out buildings "which are now occupied by said party except one room in the southwest corner of the main building therein located, which said room was then occupied by S. W. Ball and used as a barber shop." On the 12th day of September, 1902, the parties entered into an agreement which purported to be additional and supplemental to the agreement of February 15, 1901, "providing

for the leasing of lots 262, 263, 293 and 294." It recited that it was made in consideration of the settlement of certain differences arising between said parties on account of a breach by the defendant of the conditions of the lease entered into on the 15th day of February, 1901. It stipulated that, in addition to the covenants in said former contract contained, the defendant was to have the use of one-half the building on lot 294, and \$1.50 a month rent in addition to the \$22 provided in the former contract and lease, and that the lessees were to pay the sum of \$23.50 a month for the use of the buildings on lots 262, 263, 293, and one-half the building on lot 294. The lessees appear to have remained in possession of said premises and paid the stipulated rent until about the expiration of their term, when they gave to the defendant notice that they would avail themselves of the option to renew said lease for a term of five years from the 15th day of February, 1906. The defendant refused to renew the lease in accordance with said option, but notified the lessees to give up possession, and began a suit in the county court of Cass county charging the lessees with unlawfully and forcibly detaining possession of said premises, in which action a judgment of restitution was rendered. Thereupon the plaintiffs brought this action to enjoin the defendant from enforcing such judgment of restitution, and to compel the specific performance of the agreement to execute a lease for the additional term of five years. There was a judgment for the plaintiffs, and the defendant appeals.

1. Defendant alleges that the description of the property in the lease is too indefinite to enable the court to enter a decree for the specific performance of the agreement to extend the lease. It is to be observed that the lots 293 and 294 were not specifically described in the contract made in February, 1901; but in the supplemental contract made in September, 1902, this uncertainty was supplied by the reference to the February contracts as being contracts for the leasing of the four lots mentioned. It is the rule that, where the contract is ambiguous, the court will

generally follow the interpretation placed upon the same by the parties themselves. *Davis v. Ravenna Creamery Co.*, 48 Neb. 471; *Hale v. Sheehan*, 52 Neb. 184; *Lawton v. Fonner*, 59 Neb. 214; *State v. County Commissioners*, 60 Neb. 566. We are satisfied that, where a lessor surrenders possession of property imperfectly described in the lease, and the lessee accepts possession of such property as being the property intended to be let, neither party to the contract should be allowed to afterwards question the sufficiency of the description. In this case, however, the contract of September, 1902, includes the description of the two lots upon which the buildings mentioned in the first contract were situate. This supplies any defect that might have existed in the prior contract regarding the two lots in question.

It is contended that it introduced a new element of uncertainty, in that it provided that the defendant should have the use of one-half of lot 294, without specifying which half of said lot was intended. The defendant's answer alleges that the description in the lease is indefinite because it calls for a lease upon buildings, without particularly describing the land upon which they are situated. It does not plead the uncertainty in the specification of the half of lot 294. It sufficiently appears in the record that the parties themselves had no difficulty in determining which half each was to occupy. Had this question been raised in the case, it would have been the duty of the court to follow the interpretation put upon this clause by the parties, and it might, in its decree awarding an extension of the lease, have specifically described the half of lot 294 which was actually occupied by the plaintiffs under the lease. As there was no controversy presented in the court below regarding this matter, it was not necessary for the court to specifically describe the half to be awarded the plaintiffs, and its failure to do so does not make the judgment erroneous.

2. It appears that at the time of making the lease of February 15, 1901, the firm of Fred Gorder & Son was

composed of Charlotte Gorder, August Gorder and Fred Gorder, and that on February 3, 1902, John Gorder acquired a one-fourth interest in the business from August; that in May, 1904, August sold his remaining one-fourth interest to the other members of the firm; and that on February 19, 1906, John sold to Fred Gorder, and on the same day Fred sold to August, a one-half interest in the business. The defendant argues that each change in the membership of the firm operated as a dissolution of such firm and the formation of a new partnership, and that the plaintiffs could not maintain this action without showing an assignment of the lease in writing, sufficient under the statute of frauds to convey real estate, from the firm as it existed at the time of the making of the lease. It is said that an assignment of a partner's interest works a dissolution of the firm, and many authorities are cited to sustain this proposition. The reason for the rule is that a partner cannot introduce a new member into the firm without the consent of the other members, nor make them members of another firm; but there is no rule of law which forbids a partnership, with the consent of all its members, to admit a new member, and when members so taken in are recognized and treated by all as partners, and the business is continued with them under the original agreement, this is sufficient to make them partners, and does not work a dissolution of the firm. *Meaher v. Cox, Brainard & Co.*, 37 Ala. 201; *Rosenstiel v. Gray*, 112 Ill. 282.

3. In such case the new member has an interest in all the partnership property by operation of law. If the partnership has or is equitably entitled to an estate in land, such interest passes to the new member so admitted without any formal assignment. The statute of frauds expressly excepts from its provision transfers by operation of law.

4. Again, it appears that Charlotte Gorder, Fred Gorder and August Gorder were the sole members of the firm at the time of the commencement of this action, as well as at the time of the execution of the original lease. It is

hardly necessary to say that the fact that the shares held by them were in different proportion at the two dates is immaterial except as between themselves. If, therefore, the defendant's position that the right which the original firm had in the lease did not pass to the succeeding members were sound, it must have remained in the original members of the firm, who now constitute all the members thereof and are the persons in whose behalf this action is being prosecuted. Admitting, for the purpose of the argument that an assignment of the lease which should deprive the defendant of his right to resort to the property of all the members constituting the firm with which he made the original contract could not be made without his consent, that question does not arise. The firm which is asking a renewal of the lease is composed of the same individuals as the firm with which the defendant originally contracted, and a lease executed by the plaintiff firm gives to defendant everything in the way of security for performance by the lessees of their covenants that was contemplated at the time of the execution of the original lease, or which he is entitled to demand in any view of the case. It is entirely immaterial to the defendant that for some portions of the period of the original lease, for which he has received his stipulated compensation, some other persons than those constituting the firm at the time of making the contract, were interested therein as partners.

5. The defendant contends that, since a partnership may not take the legal title to an estate in land, the plaintiffs cannot maintain this action. It does not follow that, because a partnership cannot take the legal title to land, a lease to such partnership and the acceptance of rent thereunder by the lessor creates no rights in the partnership. In such case if the name of a natural person is included in the name of the partnership, such person will take the legal title in trust for the benefit of such partnership, and if there is not included in the designation of the firm the name of a natural person to whom such legal title would

pass, equity will regard the lessor, who had received the benefits of such attempted conveyance, as holding the legal title in trust for the partnership. In this case the defendant did not raise this question in his answer, and it was not, therefore, necessary for the district court to consider the same. Had it been raised by the defendant, it would have been the duty of the court, if it found the plaintiffs were otherwise entitled to a renewal of such lease, to require the defendant to make the same to some member of the firm, or other person capable of taking title to real estate, in trust for the plaintiff firm.

6. Finally, the defendant insists that the plaintiffs' remedy at law was adequate, and that they are not entitled to any equitable relief. Whatever the rule may originally have been, it has become almost a matter of course to award specific performance of contracts concerning real estate. When such contract is valid, unobjectionable in its nature, and in the circumstances connected with it capable of being enforced, and it is just and proper that it be fulfilled it is as much a matter of course for a court of equity to decree a specific performance as for a court of law to give damages for the breach of it. *Morgan v. Hardy*, 16 Neb. 427. In this case the plaintiffs purchased a stock of goods and the good will of the business theretofore carried on upon the property rented by them, with the stipulation that the defendant should not engage in the same business while they continued to rent said property. They appear to have been still carrying on this business at the time of the commencement of this action, and to have desired to renew the lease for the purpose of its continuance. Under these circumstances, an action at law would not have been an adequate remedy, and the right of the plaintiffs to equitable relief is clear and unmistakable.

We therefore recommend that the judgment of the district court be affirmed.

DUFFIE, EPPERSON and GOOD, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

IN RE JOHN C. WATSON.

JOHN C. WATSON, APPELLANT, V. WILLIAM HAYWARD ET AL., APPELLEES.

FILED JANUARY 23, 1909. No. 15,108.

1. **Attorneys: DISBARMENT.** The defendant, an attorney, dictated a form of affidavit in the presence and hearing of the witness, and which was assented to by him and taken in shorthand by a stenographer, with the understanding that the statement was to be typewritten above a signature made by the affiant on a blank sheet of paper. Upon later consultation with associate counsel and a statement to him of the facts as they had occurred, the associate not being present at the time of the dictation, it was thought the affidavit did not sufficiently detail the transaction. The associate counsel dictated additional statements, and to which a further statement was added by defendant, which was probably true, but not known so to be by the witness, together with the statement that the affidavit was made in the presence of three other persons, who were not present at the time of the dictation. The reformed affidavit was given a notary, with instructions to find the parties and procure the signature of the affiant. The notary attached his jurat and seal and handed the paper to another, with instructions to find the proposed affiant, but he was not found. The affidavit afterwards appeared with the name of the affiant erased where written by him and placed at the end of the extended instrument. The paper was originally intended for use on the hearing of an application for an interlocutory order by the district court in a cause then pending, but was never so used, nor was any attempt made to use it. Charges were presented against the defendant, by which he was accused of an effort to deceive and practice a fraud upon the court and of causing a false, forged and untruthful affidavit to be made. *Held*, That in the absence of any attempt on the part of defendant or any other person to make use of such paper, and upon a consideration of all the evidence introduced upon the hearing of the disbarment proceedings, the conduct of defendant, while not to be commended, was not such as to warrant a judgment of disbarment or suspension from practice,

In re Watson.

2. **Witnesses: PRIVILEGED COMMUNICATIONS.** Upon the hearing of the disbarment proceedings, an attorney who was associated with defendant in the principal suit was called to the witness stand by the prosecution and detailed facts within his knowledge as to the conduct and statement of defendant in their consultations concerning said affidavit and its use in the principal case, and also the conversations and statements of their client upon the same subject. *Held*, That the testimony did not divulge any communications which were privileged by law.

APPEAL from the district court for Otoe county: **WILLIAM H. KELLIGAR, BENJAMIN F. GOOD and LINCOLN FROST, JUDGES.** *Reversed and dismissed.*

Roscoe Pound, Frank T. Ransom, Matthew Gering and J. B. Strode, for appellant.

William Hayward, W. H. Pitzer and D. W. Livingston, contra.

REESE, C. J.

An information consisting of three counts was filed against defendant in the district court, by which he was accused of unprofessional conduct as an attorney at the bar of this state. Upon a hearing before the district court, the defendant was acquitted on the first and third counts; the charges in the second count were sustained, and he was deprived of the right to practice in the courts of the second judicial district for the term of one year. From that judgment he appeals.

As there is no cross-appeal by the prosecution from the findings and judgment on the first and third counts, they need not be noticed further.

The second count is quite voluminous, too long to be here copied, and we must be content with a brief summary of what it contains. The substantial averments are: That defendant was, at the time stated an attorney and counselor, duly licensed to practice at the bar of the courts of the county and district; that he was employed by one

Minitree E. Catron to aid in the defense of a suit pending against him in the district court, and in which suit one Charles D. Butterfield was plaintiff; that in the management of said defense he obtained from one A. G. Graham an oral statement of facts, then dictated by defendant to a stenographer in his employ, the said statement being taken in short hand; that he induced said Graham to sign his name on a blank sheet of paper in order that the stenographic statement might be typewritten above the signature; that at the time of procuring said signature it was not the intention of defendant to have written above the said signature the statement dictated, but that his purpose and intention was to have written a false statement not agreed to by said Graham; that he did cause to be written upon said blank sheet of paper another, untruthful and material statement, reciting that it was made in the presence of persons not present; that the false statement was of too great length to be written above the signature so made, and he caused the signature to be erased and the name of Graham written and forged at the end of the false statement; that he wrongfully and fraudulently caused the said stenographer, who was a notary public in defendant's office, to affix a false and untruthful jurat, with his seal appended, certifying that said statement was subscribed and sworn to before him, the said defendant well knowing that said statement and jurat were false and that Graham's signature was forged, and also well knowing that neither of the persons referred to as having been present were at the place where and time when the statement was in fact made by said Graham; that the purpose and intent of defendant in causing and procuring said false statements to be written and certified to by the notary was to deceive and impose upon the court where the suit to which the statement referred was pending; that he did not expect the said Graham would be present in court when said cause was heard, thereby giving him an opportunity to practice the deception intended; that he sought to procure one L. F. Jackson to testify falsely, upon the

hearing of said cause, to the effect that the false statement was signed and sworn to by said Graham in his presence, and in all of said matters the said defendant did not abstain from offensive practices as such attorney, but performed the acts alleged and consented to the acts of others, as alleged, with intent to deceive the court and procure an unfair advantage for the said Catron over the said Butterfield.

Copies of the statement agreed to by Graham as dictated, and of the purported affidavit, as prepared in the absence of Graham, are attached to the information as exhibits, but it is not deemed essential that they be set out here. It must be sufficient to say that the purported affidavit with the jurat and seal attached were of a character and contained statements which might become material upon the hearing of the question then pending and awaiting a trial in court. There was no special finding made as to any of the facts, but it clearly appears that neither of the statements were offered in evidence upon the hearing, and that no effort was made to introduce or use them. In so far as they are concerned, the misconduct was limited to their preparation. Evidence was introduced tending to show that the first statement was dictated in the presence of Mr. Graham, and to which he assented, and which was, no doubt, truthful, as it tended to show that an alleged altercation between Catron and Butterfield in a room adjoining the front room of defendant's office was not heard by Graham; the apparent object being to show that defendant was not aware that any difficulty between the parties occurred in a room which constituted a part of his office. The second statement, in the form of an affidavit, and which included the contents of the first, was much more extended, a portion of which was dictated by Mr. E. F. Warren, co-counsel with defendant in the suit; the dictation being made from the statements of defendant to Mr. Warren. It was claimed that this statement embodied the facts, in the main, which were not stated in the first, and which it was intended should also contain statements of

facts which were to be presented later, and that, when completed, was to be signed and sworn to. The paper, it was claimed, was given the notary, who was to find Graham and administer the oath; that the notary appended his jurat and official seal, but failed to find Graham, and returned the paper to defendant's office. There are other facts from which the inference is drawn by the prosecution tending to prove guilty knowledge and a fraudulent and unlawful purpose and intent on the part of defendant. There are some features of the case which tend more or less strongly to support this contention. If it be conceded that such is the fact, and taking the evidence and inferences to be drawn therefrom in their most criminating light, we yet fail to see how that unexecuted purpose, there being no attempt to make use of the papers upon the hearing, would or could justify the disbarment of defendant. That such conduct, if established would show a depraved conscience and would be highly reprehensible, no one can doubt; but, if there were no overt act the tendency of which could or would deceive the court or practice any fraud upon the opposite party in interest, we cannot see that it would call for any disciplinary action on the part of the court. In view of the contradictory evidence and the explanation of his conduct by defendant, we are forced to this conclusion. Had he made an attempt to mislead or deceive the court by the production and presentation of a spurious affidavit, even though he might not have been successful, a different question would have been presented. We have been cited to no case which holds that the acts of defendant, even if viewed as contended for by the prosecution, would call for the disbarment of an attorney. It is argued, in substance, that the loose and probably criminal conduct of the notary, with the knowledge and consent of the defendant, should call for the denunciation of the court and an affirmance of the decision. It appears that it was the practice of the notary to attach his certificate and seal to papers previous to the signing by the affiant and administration of the oath to him. That

such practice by a notary is highly culpable cannot be questioned. It should be and is denounced by all authority, honesty and reason. Yet a paper, when completed by this method, might not be invalid. The action of the notary might be a crime, and yet not call for punishment to fall upon his employer. But, treating the whole transaction as the act of defendant, accompanied by no attempt to make use of such paper in any way that could result in deceiving the court or in a miscarriage of justice, we cannot see where or how the drastic punishment of disbarment should be administered. In *In re Haymond*, 121 Cal. 385, the accused, an attorney, was informed against for offering to sell to a newspaper the confession of a party who was on trial for the crime of murder, and while the trial was in progress, it was held as not sufficient ground for disbarment; the negotiations being discontinued without the publication having been made.

We fully recognize and adopt the rule quoted from the great number of decisions cited in the very able and exhaustive brief of counsel for the prosecution, yet we are unable to see that they can be applied to this case as shown by the evidence. That there might be ground for suspicion that the course pursued by an attorney was intentionally unprofessional, or even criminal, would not alone be sufficient to call for his disbarment. A proceeding to disbar is not a criminal prosecution, nor governed by the rules of evidence in such cases, yet it partakes somewhat of that nature, and the rule seems to be well settled that the evidence must be clear and convincing in order to warrant a judgment of disbarment. 4 Cyc. 915. Upon a consideration of all the evidence, we are not convinced that there is that "clear preponderance" of the evidence which is required.

An attorney who was employed with defendant in the defense of the suit of *Butterfield v. Catron* was called as a witness for the prosecution and gave evidence as to certain transactions and conversations with defendant and their client, Catron, concerning the existence of, and use

to which it was at one time proposed to make of, the affidavit referred to. It is insisted by the defense that the attorney violated his obligation of secrecy as to such communications and that the receipt of his testimony was error. We are satisfied that neither position can be maintained. It was the theory of the prosecution that the action and conduct of defendant indicated a purpose of perpetrating a conscious, intentional fraud upon the court, and that the testimony of the attorney who knew the facts was essential to their establishment. If he believed such was the purpose, it was not only proper, but his duty, to expose and make known what had been done. The record shows that he hesitated and practically declined to speak until urged to do so by the judge of the court. The facts testified to by him did not expose the secrets of his client, such as were necessary to the management of the case. There was no privileged communication detailed by him in his testimony. See Weeks, Attorneys at Law (2d ed.), sec. 170; Reynolds' Stephen, Evidence, art. 115.

As we have seen, the information charged defendant with soliciting a witness to testify falsely upon a material matter then in issue and to be heard by the court. We find no evidence sufficient to sustain this charge, nor is it insisted upon in the briefs.

It follows that the finding and judgment of the district court will have to be reversed and the prosecution dismissed, which is done.

REVERSED AND DISMISSED.

FAWCETT and ROOT, JJ., not sitting.

JOSEPH MORRIS, APPELLEE, V. ARCHIE MILLER, APPELLANT.

FILED JANUARY 23, 1909. No. 15,460.

1. **Assault and Battery: ACTION FOR DAMAGES: INSTRUCTIONS.** In an action for damages for an assault and battery, wherein it was claimed by each of the parties that the other was the aggressor, and by the defendant that what he did was in self-defense, it was not error for the court to instruct the jury, among other things, that the right of self-defense did not imply the right to attack, or to voluntarily enter into an affray, nor to use more force than was necessary for his defense, and that the question as to who provoked the difficulty or made the first assault was for the jury to decide under the evidence.
2. **Trial: INSTRUCTIONS: CONSTRUCTION.** In construing instructions upon any given proposition, all instructions bearing upon the same should be construed together as a whole.
3. **Assault and Battery: RIGHT OF RECOVERY.** Where two persons engage voluntarily in a fight either can maintain an action against the other to recover the actual damages for the injuries he may receive, and the fact that the combat was by agreement or mutual consent of the parties to it is no defense.
4. ———: **EVIDENCE.** Immediately after an encounter between plaintiff and defendant, the plaintiff's hat was picked up near where he fell, and was introduced in evidence upon the trial, showing a break or rent at a place which, when worn, would be over or near the point of injury upon plaintiff's head. The identity, condition and possession of the hat were shown by evidence preliminary to its introduction. *Held*, That the admission of the hat in evidence was not erroneous.
5. **Appeal: HARMLESS ERROR: NEW TRIAL.** After the conclusion of the instructions by the court to the jury, and upon the jury retiring from the courtroom to deliberate upon their verdict, one of the jurors, by mistake and inadvertence, picked up the hat which had been introduced in evidence and carried it into the jury room, where it remained until the next day, when it was removed by a balliff and returned to the courtroom. The evidence adduced upon the motion for a new trial showed that the hat was taken by mistake, and that little, if any, attention was paid to it by the jurors; that it was upon the table around which the jurors assembled, and used as a ballot box a part of the time; that it was not used in any way for the purpose of influencing the minds of the jurors, and did not influence them. *Held*, That the taking of the hat to the jury room, under the circumstances, was an irregularity, but without prejudice to the defendant.

APPEAL from the district court for Buffalo county:
BRUNO O. HOSTETLER, JUDGE. *Affirmed.*

H. M. Sinclair and *W. D. Oldham*, for appellant.

C. A. Robinson, *John A. Sheean* and *H. D. Rhea*, *contra.*

REESE, C. J.

This action was instituted in the district court for Buffalo county by plaintiff, Morris, and against defendant, Miller, for damages resulting from an assault and battery alleged to have been made and inflicted by defendant upon plaintiff. A jury trial was had, which resulted in a verdict in plaintiff's favor, upon which, after an adverse ruling upon a motion for a new trial, judgment was rendered, and from which defendant has appealed. The motion for a new trial and the assignments of error in this court consist of a number of alleged grounds, but none of them is urged in the briefs, except that there was error in the instructions given by the court to the jury, errors in the admission of evidence, and misconduct of the jury while deliberating upon their verdict. These contentions will be noticed in the order in which they are presented.

1. There is no contention that there was not an encounter between the parties at the time and place named in the petition, and there would seem to be no reasonable ground to contend that plaintiff was not seriously injured in the conflict. It is claimed by defendant, both in his answer and upon the witness stand, that whatever injury plaintiff sustained was inflicted by defendant in the legal and reasonable defense of his person from an attack made by plaintiff. In support of this it is urged that the injury suffered by plaintiff was the result of a fall by him against a hitching post in front of a business house in the village of Elm Creek, and through which post was a bolt to which a ring was attached, and that the bolt protruded through and beyond the side of the post opposite the ring and

against which plaintiff fell, inflicting the wound upon his head of which complaint is made, and that the fall was occasioned by a blow given by defendant with his left hand, but which was of no greater force than was reasonably necessary for defendant's protection and defense. It was also claimed that the personal conflict was voluntarily entered into by the parties, and that defendant should not, under the circumstances, be held responsible for the resultant injury. Upon the other hand, it was claimed by plaintiff that defendant was the aggressor, and that the assault which led to the conflict was by him. Upon this part of the case the court gave the following instruction, numbered 9, and to which defendant excepted: "The court instructs the jury that the defendant alleges that he acted in self-defense. You are instructed that the law does not permit a person to voluntarily seek or invite a combat or put himself in the way of being assaulted, so that when hard pressed he may have a pretext to injure his assailant. The right of self-defense does not imply the right of attack, and it will not avail in any case where the difficulty is sought for and induced by the party by any wilful act of his, or where he voluntarily and of his own free will enters into it. The necessity, being of his own creation, shall not operate to excuse him. Nor is any one justified in using more force than is reasonably necessary to get rid of his assailant. But, if he does not bring on the difficulty, nor provoke it, nor voluntarily engage in it, he is not bound to flee to avoid it, but may resist with adequate and necessary force until he is safe. Now, if you believe from the evidence in this case that the defendant voluntarily sought or invited the difficulty in which plaintiff was injured, if you believe from the evidence that he was injured, or that he provoked or commenced or brought it on by any wilful act of his own, or that he voluntarily or of his own free will engaged in it, then and in that case you are not authorized to find for him upon the ground of self-defense. In determining who provoked or commenced the difficulty or made the first

assault, you should take into consideration all the facts and circumstances in evidence before you."

The jury were quite fully instructed upon the different phases of the case, and, with one other exception, to be hereafter noted, no complaint is made of instructions given. As it is the well-established rule that all instructions given should be considered and construed together, we refer to instruction numbered 10, to which no complaint is made, and which we here set out: "The court instructs the jury that, if you believe from the evidence that plaintiff began the affray and was the aggressor, then you are instructed that the defendant had a right to defend himself from such assault, and he would have the right to use that amount of force which was reasonably and apparently necessary in making his defense. And if you believe from the evidence that the defendant was so acting in self-defense from a real and honest conviction of apparent danger, or what would seem apparent danger to a reasonable man, you will return a verdict for the defendant, unless you further believe from the evidence that the defendant unlawfully used a degree of force and violence upon the plaintiff that was not reasonably and apparently necessary under the facts and circumstances then and there surrounding the defendant."

These instructions correctly state the law. The evidence clearly and conclusively establish the fact that the parties were in a business house in Elm Creek, and that there was a difference or quarrel between them. As to the extent of the anger displayed by each of them, the evidence is conflicting; but all agree that plaintiff left the building through the front door closely followed by defendant, both crossing the sidewalk into the street, but to only a few feet beyond the outer edge of the sidewalk, and the conflict was immediately entered upon. Just which one made the first attack may be in some doubt, as each one places the blame upon the other. It is claimed by plaintiff that defendant made the first attack and struck him in the forehead with some deadly instrument

Morris v. Miller.

by which the wound was inflicted, while defendant claims he did not make the attack, but acted solely in the defensive, using only his fist, and by which the wound complained of could not have been inflicted. When we consider these contentions, we can see no objection to the instruction complained of as being to defendant's prejudice. If it is true, as claimed by plaintiff, that defendant sought or invited the combat, and made use of a dangerous instrument by which the injury was inflicted, or that he created the occasion in order to inflict it, or did intentionally inflict it, the instructions cannot be said to be misleading, or to misstate the law. They properly left the whole question for the consideration of the jury under "all the facts and circumstances in evidence" before them.

The next instruction of which complaint is made is numbered 11, and is as follows: "You are instructed that, if you believe from the evidence that plaintiff and defendant voluntarily and by agreement entered into a fight, still I charge you that such agreement, if made, was unlawful, for the reason that such agreement, if made, would be in violation of the laws of the state and void, and such agreement, if made, would not be any defense to this action." This instruction was given as applicable to the contention that the fight or combat was entered into voluntarily and by mutual agreement, and that the unsuccessful party to the strife could not transfer his cause from the street to the courts, and recover damages for whatever injury he might sustain by reason of the prowess or activity of his adversary. At the time of the argument of the case at the bar of this court, the writer was of the opinion that the giving of the instruction might have been erroneous, but more mature reflection and an examination of the authorities have led to a different conclusion. It is true that an instruction of this kind would be condemned by some reputable authorities, among which are *Galbraith v. Fleming*, 60 Mich. 403, and *Smith v. Simon*, 69 Mich. 481; but it is quite clear

that the great weight of authority is the other way, and that the recognized rule is that, where two parties fight voluntarily, either party may recover from the other the actual damages suffered, and the consent of the plaintiff to engage in the combat will not bar his suit to recover. In jurisdictions where punitive damages are allowed, the consent will prevent the allowance of such damages, but will not prevent recovery for the actual loss or damage.

In referring to the rule that one cannot recover for an injury to the infliction of which he has consented, the supreme court of Ohio, speaking through Judge Marshall, in *Barholt v. Wright*, 45 Ohio St. 177, say: "But as often as the question has been presented, it has been decided that a recovery may be had by a plaintiff for injuries inflicted by the defendant in a mutual combat, as well as in a combat where the plaintiff was the first assailant, and the injuries resulted from the use of excessive and unnecessary force by the defendant in repelling the assault. These apparent anomalies rest upon the importance which the law attaches to the public peace, as well as to the life and person of the citizen. From considerations of this kind it no more regards an agreement by which one man may have assented to be beaten, than it does an agreement to part with his liberty and become the slave of another. But the fact that the injuries were received in a combat in which the parties had engaged by mutual agreement may be shown in mitigation of damages. * * * This, however, is the full extent to which the cases have gone"—citing cases. In *Grotton v. Glidden*, 84 Me. 589, it is said: "The evidence satisfies us that the plaintiff's injuries were received while he and the defendant were engaged in a voluntary fight. The defendant contends that he acted only in self-defense. But the evidence satisfies us that the fight was voluntary on the part of both parties. This brings us to the question whether, if two persons engage voluntarily in a fight, either can maintain an action against the other to recover damages for the injuries he may receive. We

think he can. It seems to be settled law that each may maintain an action against the other. It is familiar law that each may be punished criminally. And it seems to be equally well settled that, by the rules of the common law, each may have an action against the other and recover full damages for all the injuries he received. The fact that the fight was voluntary is admissible in evidence, as are many other facts, to keep down the amount of punitive damages, but not to reduce the actual damages"—followed by citations and extracts from a number of cases. The rule is also recognized and stated in *Willey v. Carpenter*, 64 Vt. 212, annotated in 15 L. R. A. 853; *Shay v. Thompson*, 59 Wis. 540; *McNeil v. Mullin*, 70 Kan. 634; *Adams v. Waggoner*, 33 Ind. 531; *Jones v. Gale*, 22 Mo. App. 637; *Bell v. Hansley*, 48 N. Car. 131. See, also, 1 Cooley, Torts (3d ed.), p. 282, and 3 Cyc. 1070. In *McNatt v. McRae*, 117 Ga. 898, 45 S. E. 248, which was an action for an assault and battery, it was held that cross-actions in favor of each party against the other may arise out of the same affray, and such claims for damages may be presented in separate suits, or in a petition by one and a plea of set-off by the other.

We therefore find no error in the instructions complained of.

2. It is insisted that the court erred in permitting a hat, which plaintiff claims to have worn at the time of the encounter, to be put in evidence. It is said that the hat introduced had a hole or rent at or about the point where plaintiff was wounded; that the hat was on his head at the time; and it was claimed that the break or rent in the hat showed that it could not have been made with the fist of defendant, and from this it was argued that some heavy and dangerous instrument was used by defendant in striking the blow. The claim is that there was not sufficient preliminary proof of the identity of the hat, or that it was presented in the same condition as when found, to permit its submission to the jury. The hat introduced was shown to be the property of plaintiff

and upon his head at the time of the encounter; that it was picked up at the place where plaintiff had fallen, and had been preserved in its present condition from that time to the time of its introduction. We can detect no error in the action of the court in that behalf.

3. The next contention is upon the ground of misconduct of the jury with reference to the hat above alluded to. From the evidence submitted upon the hearing of the motion for a new trial it appears that, when the jury retired from the courtroom for the consideration of their verdict, one of the jurors, presumably by mistake and inadvertence, picked up the hat in question and carried it to the jury room, where it remained until the forenoon of the next day, when it was returned to the courtroom by a bailiff; that practically no attention was paid to it in the jury room; that it attracted little or no attention while there; that it had no influence on the verdict of the jurors; and that during a part of the time it was upon the table, around which the jurors were gathered, and was used as a ballot box into which the jurors placed their ballots when voting. There is no suggestion that the removal of the hat to the jury room by the juror who took it there was with any evil or corrupt intent, or that it was there used for any improper purpose, or, indeed, any purpose which could influence the deliberations of the jury, or have any effect upon the result thereof. That the taking of the hat to the jury room was an irregularity is perhaps true, and would not have occurred had the attention of the court, counsel, or juror been called to the fact. But, as the act was an innocent mistake, without wrongful intention, and as it is shown beyond question that no use was made of the hat by the jury which could in any way affect or influence the minds of the jurors or work any injury to defendant, we must hold that it was without prejudice to him and affords no ground for a reversal of the judgment. Code sec. 145.

Finding no reversible error in the record, it follows

Mott v. State.

that the judgment of the district court must be affirmed, which is done.

AFFIRMED.

AMOS MOTT V. STATE OF NEBRASKA.

FILED JANUARY 23, 1909. No. 15,653.

1. **Rape: EVIDENCE: CORROBORATION.** In a prosecution for the crime commonly called statutory rape, where the prosecuting witness testifies positively to the facts constituting the crime, and the defendant as positively and explicitly denies her statements, her testimony must be corroborated by facts and circumstances established by other competent evidence in order to sustain a conviction.
2. Evidence examined, its substance stated in the opinion, and held not sufficient to sustain the verdict.

ERROR to the district court for Buffalo county: BRUNO O. HOSTETLER, JUDGE. *Reversed.*

H. M. Sinclair and W. D. Oldham, for plaintiff in error.

William T. Thompson, Attorney General, and Grant G. Martin, contra.

BAERNES, J.

Amos Mott, hereafter called the defendant, was convicted of the crime of statutory rape at the April, 1908, term of the district court for Buffalo county, and was sentenced to imprisonment in the penitentiary for seven years. He now alleges error in the proceedings. His assignments, so far as we deem them material, will be considered in the order in which they are presented.

Defendant contends, first, that the verdict is not sustained by sufficient evidence, and, second, that the verdict and judgment are contrary to law, and these assignments will be considered together.

It may be conceded at the outset that there is no sub-

stantial controversy in the record as to the following facts: The defendant is a male person over the age of 18 years. The prosecutrix, at the time she alleges the offense was committed, was under 15 years of age. That some one had sexual intercourse with her at or about the date of the alleged offense, in Buffalo county, Nebraska, is established beyond question, and so the only fact in dispute is whether the defendant is the person who committed the unlawful act. The defendant's argument is that the prosecuting witness is uncorroborated as to the principal fact, and therefore the verdict cannot stand. This contention requires a careful review of the evidence. We find that as to the alleged criminal act the prosecutrix testified, in substance, that on the evening of June 1, 1907, she left her home in Kearney and went to a meat market, situated upon one of the principal streets of that city, with two other girls whose errand was to purchase meat; that they met the defendant, who went with them a part of their way home; that she and the defendant returned to the principal business street, where in a building adjoining the post office he kept an automobile garage; that he asked her to go out riding with him, and she consented to do so; that about 9 o'clock or shortly after that time, they got into an automobile and went west on the main street, past the normal school building and the ball ground; that about a block from the ball ground defendant turned the machine out to the left side of the road, stopped, and said to her: "Let's have some fun?" that she said: "I won't do it." That he thereupon pushed her over onto the seat, and had sexual intercourse with her; that they then returned to the garage, put up the machine, and went to her home, the defendant accompanying her and helping her up the steps; that they had intercourse but once; that she never had intercourse with the defendant either before or since that time, and had never known any other man.

The defendant testified in his own behalf, and denied positively and explicitly that he ever at any time had

sexual intercourse with the prosecutrix. He also testified as to his whereabouts at the time she alleges the unlawful act took place between them and, if his evidence is to be believed, the occurrence to which the prosecutrix testified could not have taken place. His evidence is strongly corroborated by the testimony of a Mr. Edwards, with whom he claims he was at the day and hour in question. The act of unlawful commerce being thus specifically and positively denied, the evidence of the prosecutrix as to that fact must be corroborated, and, if there is want of corroboration such as the law requires, the judgment of the district court should be reversed.

The state contends that the fact that the parties were well acquainted tends to corroborate the evidence of the prosecutrix. It appears that a brother of the defendant married a sister of the prosecuting witness and this fact is sufficient to account for the matter of mere acquaintanceship, and the slight acts of familiarity, if any such acts are shown to have occurred between the parties. It is also claimed the defendant was seen in company with the prosecutrix on the evening of June 1, 1907, and afterwards took her home and helped her onto the porch. This defendant denies, and shows his whereabouts at that time. It is true that the mother of the prosecutrix testified that the defendant brought her daughter home and helped her onto the porch on the night of June 1, 1907; but at least four other witnesses testified that she was at a dance at the home of a man of the name of Shaw, and was accompanied by a young man of the name of Jesse Shoop, who says he took her to the dance, and escorted her home therefrom. It is doubtful if the mere fact of being seen in her company and taking her home amounts to a corroboration, but, if so, the whole question is put in doubt by the conflicting evidence as to her whereabouts when she alleges the transaction in question occurred. The mother also testified that at or about 7 or 8 o'clock on the morning of June 2, she found a blue silk skirt worn by her daughter the previous evening across

the foot of her bed; that it had a substance on it which she said was "what comes from a man"; that it was wet and slimy; and it is claimed by the state that this is sufficient corroboration. The truth of this evidence is greatly shaken by expert testimony, by which it was shown that under such circumstances and conditions, if there had been any such substance on the skirt, it would have been so dry at the time the witness claims to have discovered it that a microscopic examination would have been required in order to determine what it was. Be this as it may, however, this evidence would not show, or even tend to prove, that defendant was responsible for the condition of the skirt; and it is just as likely that the condition described was caused by some one of the numerous young men with whom she says she was keeping company as by the defendant. Again, the fact that the mother thought so little of the matter at the time that she failed to even call the daughter's attention to it stamps the whole story with the mark of improbability. It is claimed that the fact that the prosecutrix gave birth to a child at a time which corresponds with the usual period of gestation from and after June 1, 1907, corroborates her as to the principal fact of unlawful cohabitation. It is true that this is not only corroboration, but is conclusive evidence of that fact, but it does not even tend to prove that the defendant was the guilty person.

Finally, it is contended that defendant left the county after learning that a warrant was out for his arrest, and this is corroborative of his guilt. We think the evidence fails to support this contention. It is an undisputed fact that complaint was filed in this case, and a warrant was issued and placed in the hands of the sheriff of Buffalo county with a request not to serve it upon the defendant until further orders. It also appears that defendant was advised of that fact, and the warrant was held by the sheriff for several weeks without any attempt to serve it; that defendant notified the sheriff of his intended trip to Illinois, and, as shown by the evidence, as soon as he as-

Mott v. State.

certained that the prosecutor had decided to proceed with the case he returned to Kearney, and entered his voluntary appearance before the magistrate. It is therefore apparent that this contention must fail.

Without resorting to quotation, we have stated the substance of the evidence which the state claims corroborates the testimony of the prosecutrix as to the principal fact involved in this controversy. That such corroboration is required is well settled. *Mathews v. State*, 19 Neb. 330; *Klawitter v. State*, 76 Neb. 49; *Burk v. State*, 79 Neb. 241; *Fitzgerald v. State*, 78 Neb. 1. As to the nature of the corroboration necessary to sustain a conviction in such cases, the authorities seem quite clear. Where the law requires the corroboration of a witness, it must be accomplished by other evidence than that of the witness himself. His own acts or statements do not constitute corroborative evidence. *State v. Kingsley*, 39 Ia. 439; *State v. Lenihan*, 88 Ia. 670; *State v. McGinn*, 109 Ia. 641. Facts, whether main or collateral, must be established by competent testimony before they become of probative force in a lawsuit; and it is self-evident that the main fact in this case cannot be strengthened by a collateral fact, the existence of which is dependent upon the same class of testimony.

Again, if it be admitted that the defendant was in the company of the prosecutrix, as testified to by the Grieves girls, and if it be further admitted that the defendant on one occasion at or about June 1, 1907, brought the prosecutrix home in the evening, as stated by the mother, these facts of themselves alone are not corroborative, because they simply mean opportunity, and opportunity is not of itself corroboration. *Fitzgerald v. State*, *supra*. So we conclude that the testimony of the prosecutrix was not sufficiently corroborated, and the evidence is insufficient to sustain the verdict. This requires a reversal of the judgment, and renders it unnecessary for us to discuss any of the other errors complained of.

It is possible, and indeed it is quite probable, that the

state, if the case is tried again, will be able to produce some corroborating evidence. It is not at all probable that the defendant and the prosecutrix could take an automobile from his garage adjoining the post office upon a principal street of the city of Kearney on a Saturday night at an hour when the street was full of people, and travel along that street to the point described in the evidence, return and put away the machine, without being seen and recognized by some one; and, unless the city of Kearney is in the condition of Goldsmith's deserted village, it is reasonable to suppose that by suitable and proper inquiry on the part of the prosecuting attorney he will be able to find some one who, if the testimony of the prosecutrix is true, saw them and recognized them upon that occasion.

For the foregoing reasons, the judgment of the district court is reversed and the cause is remanded for further proceedings according to law.

REVERSED.

ROSE, J., not sitting.

ROOT, J., dissenting.

I cannot concur in a judgment of reversal. Defendant was given a fair trial. He was ably defended by experienced counsel, and, as the jurors heard all of the witnesses testify and found beyond a reasonable doubt that he was guilty as charged, their verdict ought not to be disregarded because the corroborative evidence is contradicted and not altogether probable. The sufficiency of that evidence was for the jury to determine. *State v. Norris*, 127 Ia. 683; *Van Vleck v. Anderson*, 136 Ia. 366; *State v. Montgomery*, 79 Ia. 737; *Commonwealth v. Allen*, 135 Pa. St. 483. The birth of the complaining witness' child established the fact that some one had committed the offense charged. *Suther v. State*, 118 Ala. 88. To connect defendant therewith there is the positive statement of the injured female, the testimony of the

Russell v. Estate of Close.

two Grieves girls that defendant met complainant in the evening just as she detailed, the testimony of the mother that defendant brought her daughter home late in the night during which the child says the act was accomplished, the testimony of both daughter and mother that the child's underskirt was stained with semen, the testimony of the girl, which defendant did not deny, that within a few weeks thereafter he sought on two different occasions to entice her to his bachelor apartments, the fact that defendant left the state shortly after he was accused of the offense, and that he escaped from custody of the officers in Indiana when arrested on request of the Nebraska authorities. It is true that explanatory evidence was offered by defendant, that some of the state's testimony does not seem reasonable, and that defendant attempted to prove an alibi. But if the jurors believed the girl, her mother, and the Grieves girls, as they had a right to do, their verdict is amply sustained by the evidence and it should not be disturbed by this court.

REESE, C. J., concurs in dissent.

MARY G. RUSSELL, APPELLEE, v. ESTATE OF JOHN A. CLOSE,
ET AL., APPELLANTS.

FILED JANUARY 23, 1909. No. 15,850.

1. **Executors and Administrators: CLAIMS: EVIDENCE.** C., an aged man, who was afflicted with an incurable disease, agreed with R. that if she would remain in his home as his housekeeper, companion and nurse, and care for and nurse him until his death, he would pay, or cause to be paid, to her, \$1,000 in addition to the wage he was then paying her, which was \$2 a week. He reduced his agreement to writing and signed the same. She accepted its terms and fully performed its obligations on her part. He accepted her services until his death, which occurred nearly a year thereafter. *Held*, That this created a debt against his estate, and that the writing could be received in evidence as tending to prove the agreement.

2. **Trial: WRITING: DELIVERY: QUESTION FOR JURY.** One of the defenses interposed by those interested in the estate was nondelivery of the writing. The plaintiff having produced some competent evidence tending to prove a delivery, the court submitted that question to the jury under proper instructions. *Held*, That this furnished the defendants no ground for complaint, and the court did not err in refusing to instruct the jury to return a verdict for the defendants.
3. **Witnesses: TRANSACTION WITH DECEDENT: WAIVER.** The defendants reproduced in evidence, as tending to show nondelivery, a part of the plaintiff's testimony, given without objection on the hearing upon her claim in the county court, relating to a part of the transaction which took place between her and the deceased when the agreement in question was made. *Held*, That they thereby waived the protection afforded the estate by section 329 of the code, and that the plaintiff was entitled to reproduce the rest of her former evidence as to that particular transaction.

APPEAL from the district court for Dodge county: CONRAD HOLLENBECK, JUDGE. *Affirmed*.

Frank Dolezal, George L. Loomis and H. C. Maynard,
for appellants.

Grant G. Martin, R. J. Stinson and J. C. Cook, contra.

BARNES, J.

The appellee, who was the plaintiff in the trial court, filed a claim against the estate of one John A. Close, late of Dodge county, consisting of several items, one of which was for \$1,000, based on a certain agreement or written promise made to her by the deceased about a year before his death, which reads as follows: "Arlington, July 15th, 1903. I do hereby promise to pay Mary G. Russell \$1,000—one thousand dollars—or leave that sum to be paid to her at my death, for services rendered me by her as house-keeper and companion and nurse for the past four years, and until my death, besides her weekly wages, which I pay quarterly. Mr. John A. Close." She alleged that she had fully complied with all of the provisions of the agreement on her part; that she had remained in the home of

the deceased as his housekeeper, companion and nurse; that she nursed and took care of him until his death, which occurred nearly a year after he gave her the promise above quoted; that no part of the \$1,000 mentioned therein had been paid to her, and prayed for a judgment against his estate for that sum. The executor of the estate refused to pay any of the items of plaintiff's claim, and a hearing was had before the county court of Dodge county thereon. From the order entered therein the case was appealed to the district court. For defense to that portion of the claim above mentioned the defendants denied the execution and delivery of the writing, and alleged that it was made and obtained by the plaintiff by means of undue influence over the deceased; that he was, by reason of his mental and physical condition, incompetent to make said agreement or promise, and defendants also introduced testimony tending to show that the instrument was a forgery. A trial in the district court resulted in a verdict and judgment for the plaintiff upon all of the items of her claim. Thereupon the executor prosecuted error to this court, where the judgment was reversed because the trial court received plaintiff's evidence as to the transactions which had taken place between her and the deceased in violation of the provisions of section 329 of the code. See *Russell v. Estate of Close*, 79 Neb. 318. Upon a retrial in the district court, the plaintiff again recovered judgment, and the defendants have brought the case here a second time by appeal.

Three grounds are assigned for a reversal of the judgment: First, that the evidence does not sustain the verdict, in that it fails to show a delivery of the written promise; second, that the trial court erred in receiving in evidence the cross-examination of the witness Anna Godel; and, third, that the court erred in refusing to direct a verdict for the defendants. These assignments will be disposed of in the order in which they are presented.

1. The defendants' contention as to the insufficiency of the evidence is based on the claim that the instrument in

question was never delivered to the plaintiff by John A. Close, and therefore it never became operative, and no action can be maintained thereon. As a foundation for this contention, defendants treat the instrument as a negotiable promissory note, and have cited many authorities which hold that a promissory note in order to furnish a basis for an action must be absolutely and unconditionally delivered to the payee in the lifetime of the maker. If the writing in question was in fact or in law such a note, defendants' contention would merit serious consideration. The instrument, however, in our opinion, is not a promissory note. It is merely the written evidence of an agreement on the part of the deceased to pay, or cause to be paid, to the plaintiff, the sum of \$1,000 in case she should remain with him as his housekeeper, companion and nurse, and should perform those duties and care for him until his death. To be binding on him, it required her acceptance of its terms, and the performance of the duties imposed thereby upon her part. The agreement was so treated by her when she entered upon its performance, and continued to faithfully care for the deceased, which she did, until his death, and it was so treated by her in her petition in the district court. It is true that in two places in her petitions he speaks of the writing as a "promissory note or agreement," but this does not affect its real nature or change its legal effect. Full performance of the terms of this agreement having been shown by the plaintiff, and her services having been accepted, the writing was admissible in evidence when it was shown to have been signed by the deceased, and failure to prove delivery would not destroy its evidential value as proof of the agreement which it purports to set forth. The instrument was, therefore, properly received in evidence, even if there had been no proof of its manual delivery to the plaintiff. 3 Ency. of Ev., p. 521; *Eager v. Crawford*, 76 N. Y. 97; *Mobile Marine D. & M. Ins. Co. v. McMillan & Son*, 31 Ala. 711. Again, if John A. Close dictated and signed this contract or agreement, and thereby induced

the plaintiff to believe that he had made provision for her other than her weekly wages, and afterwards permitted her to render him valuable services as a housekeeper, companion and nurse under such belief, neither he nor his representatives should be allowed to say that the agreement was inoperative for want of a formal delivery. *Walker v. Walker*, 42 Ill. 311; *Reed v. Douthit*, 62 Ill. 348; *Hayes v. Boylan*, 141 Ill. 400.

The record before us discloses, however, that the district court was of opinion that delivery of the agreement was essential, and submitted the case to the jury on that theory under the belief that there was competent evidence tending to show an actual or, at least, a constructive delivery of it to the plaintiff. This ruling favored the defendants' theory of the case, and furnishes them no grounds of complaint. The testimony on this point was, in substance, that on the 15th day of July, 1903, the plaintiff suggested to John A. Close that he was so badly afflicted, and that it was so much work to care for him and nurse him, that \$2 a week was not a sufficient compensation. He assented to that statement, and thereupon dictated the instrument in question, which she wrote precisely as he gave it to her; that he signed it, and delivered it to her with the suggestion that she keep it in a desk which contained his will and some of her private papers. She assented to this suggestion, and placed the paper in the desk, where it was found and taken possession of by the executor. It appears that she carried the key to the desk, and, whenever the deceased wanted any papers taken out of that receptacle, she unlocked it and got them for him; that she also had some private papers of her own which she kept in the same desk, and that she gave the key to the executor to enable him to get the will. It therefore seems clear to us that the district court was right in the conclusion that there was sufficient evidence of a delivery to require the submission of that question to the jury.

2. This brings us to the consideration of the defendants'

second assignment, which is that the district court erred in admitting incompetent and immaterial evidence. It appears that, after the plaintiff had introduced all of her evidence and rested her case, the defendants deeming the question of the delivery of the instrument a material and important one, for the purpose of proving nondelivery, called a witness, one Anna Godel, a stenographer, who reported the testimony which was taken on the hearing in the county court, and had her reproduce from her stenographic notes so much of the plaintiff's testimony relating to the transaction in question with the deceased, and which had been there given by her without objection, as they thought tended to show that the instrument had never been delivered to her. The plaintiff thereupon, by the cross-examination of this witness, was allowed to reproduce the remainder of the plaintiff's evidence relating to that particular transaction. It is now strenuously contended that this evidence should have been excluded, and that its reception was a violation of the provisions of section 329 of the code, which reads as follows: "No person having a direct legal interest in the result of any civil action or proceeding, when the adverse party is the representative of a deceased person, shall be permitted to testify to any transaction or conversation had between the deceased person and the witness, unless the evidence of the deceased person shall have been taken and read in evidence by the adverse party in regard to such transaction or conversation, or unless such representative shall have introduced a witness who shall have testified in regard to such transaction or conversation, in which case the person having such direct legal interest may be examined in regard to the facts testified to by such deceased person or such witness, but shall not be permitted to further testify in regard to such transaction or conversation." Now, if the defendants had not introduced a part of the plaintiff's testimony relating to the transaction in question, the evidence complained of could not have been received. But, having seen fit to waive the protection

offered by the statute, and having produced a part of the plaintiff's evidence relating to the transaction in question with the deceased, they thereby rendered the rest of her testimony as to that transaction competent.

In *Niccolls v. Esterly*, 16 Kan. 32, and *Roberts v. Briscoe*, 44 Ohio St. 596, it was held that by introducing a part of the evidence of the interested party the defendant opens the door to all of it. Again, this statute has been many times construed by this court in cases which are decisive of this question. It has been held that, where an administrator introduces in evidence a letter from the adverse party, giving a narrative of the transaction with a deceased person, upon which the action is based, the evidence of the adverse party as to the transaction recited in the letter upon his own behalf is not incompetent under the provisions of this section. *Cline v. Dexter*, 72 Neb. 619. In *Davis v. Neligh*, 7 Neb. 84, it was said: "But where a witness has related a portion of what took place at a particular time or place, or a part of a particular transaction, he may be cross-examined as to matters showing the *entire transaction*." *American Savings Bank v. Estate of Harrington*, 34 Neb. 597, was an action on a note signed by a father and son, filed as a claim against the estate of the father. On the trial the son testified as a witness that his father was merely a surety on the note, and that he was the principal; that the note had been extended from time to time without the knowledge or assent of his father. He was then asked if it was not a part of the agreement between himself and his father on one side, and the bank on the other, that the note was not to be paid in full when due, but was to be extended from time to time for about one year. The evidence was excluded, and it was held by this court that it was competent and proper because, the estate having shown a part of the transaction, the plaintiff was entitled to show the whole of it. In *Taylor v. Ainsworth*, 49 Neb. 696, it was alleged by plaintiff, an executor of a person deceased, that the defendant had received from the deceased during her

lifetime, the sum of \$1,000, which he undertook to loan for her at advantageous rates, and which he falsely and fraudulently pretended to her he had so loaned, and that he had refused to pay the same or any part thereof. On the trial of the issues as properly involving the performance of a trust, certain letters of the defendant were introduced in evidence by plaintiff, which defendant was required to identify as a witness, and as a witness he was required by plaintiff to state simply that he had received from the deceased \$1,000. It was held that the transaction between the deceased and the witness was an entirety, and that the proof above made authorized the defendant to testify as to how little, if anything, remained unpaid to the estate of the testatrix. It appears from the record that the trial court carefully excluded all of the evidence of the plaintiff given upon the hearing in the county court, except so much as related to the particular transaction about which the defendants inquired. By introducing the evidence of the witness Anna Godel, the defendants waived the right guaranteed them by the statute, and the district court did not err in refusing to exclude the evidence complained of.

3. As to the defendants' third contention, that the court erred in refusing to direct the jury to return a verdict in their favor, it is sufficient to say that, if we are right in our conclusions as to the other two assignments, it was proper for the court to refuse this instruction. There was at least some competent evidence tending to show the delivery of the instrument in question, and to establish all of the elements necessary to authorize a recovery on the part of the plaintiff. It would therefore have been reversible error for the district court to have directed a verdict against her.

Finding no error in the record, and it appearing (to quote a favorite expression of a former honored member of this court) "That substantial justice has been done," the judgment of the district court is

AFFIRMED.

CHARLES R. POSTON V. STATE OF NEBRASKA.

FILED JANUARY 23, 1909. No. 15,927.

1. **Criminal Law: ASSIGNMENT OF ERRORS: MOTION FOR NEW TRIAL.** In a case brought to this court by a petition in error, exceptions to the giving or refusing of instructions will not be considered unless such rulings are specifically assigned in the motion for a new trial.
2. **Witnesses: CROSS-EXAMINATION.** The rule that the right to cross-examine a witness is confined to matters brought out in his direct examination, obtains in a criminal prosecution the same as in a civil action, and a defendant in such prosecution will not be permitted to prove matters of defense upon the cross-examination of a witness for the state, where such matters are not brought out or suggested by the direct examination.
3. **Intoxicating Liquors: KEEPING FOR UNLAWFUL SALE: EVIDENCE.** In a prosecution for a violation of the provisions of section 7170, Ann. St. 1907, making it a crime for a person to keep and have in his possession intoxicating liquor for the purpose of unlawful sale, the state chemist, who analyzed the liquor found in the defendant's possession, is a competent witness to testify as to the per cent. of alcohol contained therein, and, where such liquor is designated in the information as an intoxicating liquor called "beer," it is competent for such witness to give the amount or per cent. of alcohol contained therein, and the amount or per cent. of alcohol contained in the different kinds of beer commonly sold and used in this state.
4. **Witnesses: CROSS-EXAMINATION: INCRIMINATION.** Where a defendant in a criminal case testifies in his own behalf, he is subject to the same rules of cross-examination as any other witness, and may be required to testify on his cross-examination as to any matters brought out or suggested by him on his direct examination, and ordinarily he cannot avail himself of the objection that the evidence may incriminate him.
5. **Intoxicating Liquors: UNLAWFUL SALES: EVIDENCE.** Where it is shown in a criminal prosecution that certain liquor has been sold by the defendant from time to time as a beverage, it is competent for the state to prove that during such time certain persons had been seen in an intoxicated condition in the defendant's place of business as tending to show that the liquor so sold was intoxicating in its effect.

6. Indictment and Information: SEPARATE COUNTS: ELECTION. In a criminal prosecution, where two or more counts are properly joined in an information, and there is evidence tending to prove the facts alleged in each of them, the state will not be required to elect upon which of the several counts it will rely for a conviction.

ERROR to the district court for Harlan county: **HARRY S. DUNGAN, JUDGE.** *Affirmed.*

John Everson, for plaintiff in error.

William T. Thompson, Attorney General, and *Grant G. Martin*, contra.

BARNES, J.

The plaintiff in error, hereafter called the defendant, was prosecuted for a violation of the provisions of section 7170, Ann. St. 1907, making it unlawful for any person to keep for the purpose of sale, without a license, any malt, spirituous or vinous liquor in this state. The first count of the complaint charged defendant with keeping and having in his possession certain intoxicating liquor called "barley mead," for the purpose of unlawful sale. The second count charged him with having in his possession, for the same purpose, certain intoxicating liquor called "beer." The third count charged him with having in his possession certain intoxicating liquor called "whiskey," for the purpose of sale without a license. There was a search and seizure of three barrels of liquor called "barley mead," which was found in the defendant's possession. He was held to answer to the district court, where an information was filed against him by the county attorney charging the same offenses set forth in the complaint before the magistrate. His trial resulted in a conviction upon the first count of the information, and a verdict of not guilty as to the second count; the prosecution in the meantime having dismissed as to the third

count. Defendant was thereupon adjudged to pay a fine of \$100 and the costs of prosecution, and from that judgment he has brought the case here by petition in error.

His first seven assignments of error relate to the giving and refusal to give certain instructions to the jury, and these assignments will be considered together.

We find from an examination of the record that in the defendant's motion for a new trial no complaint was made of the giving or refusal to give instructions. It is therefore contended by the attorney general that this court has no right to consider any of these assignments. It seems clear that this contention must be sustained. In *Cleveland Paper Co. v. Banks*, 15 Neb. 20, it was held that "under the general assignment, in the motion for a new trial, of 'errors of law occurring at the trial,' only such errors as appear in the bill of exceptions can be considered. If objection is made to any of the instructions, it must be specifically assigned." This rule, so far as we are able to ascertain, has been approved and followed in all cases where this question has arisen since the decision above mentioned. In *Hamilton v. Goff*, 45 Neb. 339, it was said: "It has long been the rule of this court that exceptions to the giving or refusing of instructions will not be noticed unless such rulings are specifically assigned in the motion for a new trial"—citing *Cleveland Paper Co. v. Banks*, *supra*, and *Omaha & R. V. R. Co. v. Walker*, 17 Neb. 432. The rule announced in these cases is decisive of this question as presented by the record in the case at bar.

The eighth assignment of error is as follows: "The court erred in refusing the defendant the right to cross-examine the witness for the state, T. W. Carroll, and in sustaining the objections to such cross-examination." The record discloses that the examination in chief of this witness was limited to the seizure of the liquor in question on March 16, 1908. The rule that the cross-examination of a witness should be limited to matters brought out upon his examination in chief is too well settled to require the cita-

tion of authorities to support it. It is contended, however, that it was the purpose of the defendant by the cross-examination in question to bring out the fact that the liquor seized was not in his place of business on the 14th day of March, two days before its seizure; that it arrived after the 14th inst., and was stored away by him pending his investigation of his right to sell it. The record shows that he was permitted to ask the witness whether he made a search under the warrant on March 14, and the answer was, "No." The witness was thereupon excused by the defendant with leave to recall him for further cross-examination, but he was not recalled during the trial. It also appears that the witness on direct examination testified that he searched the defendant's place of business on the 16th day of March, 1908, and was not interrogated upon his direct examination as to any other search or seizure than the one which occurred upon that day. So, technically speaking, the objection to the testimony attempted to be brought out by the defendant on the cross-examination of this witness was well founded. It further appears that the defendant was permitted to show the fact that the sheriff came to his place of business on the 14th day of March, and found no liquor in his possession; that on the 16th he accosted the defendant while at the depot, and told him that he desired to search his premises. This is the only search and seizure mentioned in the record. The defendant was permitted to show all of the facts and circumstances surrounding that transaction, and to introduce on his own behalf, testimony of the fact sought to be elicited from the sheriff by the cross-examination in question. It is apparent, therefore, that he was not deprived of any substantial right by the refusal of the court to permit him to cross-examine the witness on that point.

It is also contended that the court erred in receiving the testimony of the state chemist, Redfern, who analyzed the barley mead which was found in the defendant's possession. It appears that the witness upon his redirect

examination was permitted to testify as to the per cent. of alcohol contained in the different kinds of beer commonly sold and used in this state, naming them, as well as the per cent. of alcohol contained in the liquor in question. The defendant admitted having this liquor in his possession, and testified that he had from time to time for at least a year previous to his arrest sold the same as a beverage. It was therefore competent for the state to prove that the liquor was intoxicating in character, and it was proper for the chemist to testify as to the amount or per cent. of alcohol contained therein. Again, the defendant was charged in the second count of the information with having in his possession certain intoxicating liquor called "beer" for the purpose of selling the same without a license; and this evidence tended to show that the liquor seized belonged to the class of intoxicating liquors called "beer."

Defendant further alleges error in the refusal of the court to sustain his objections to his cross-examination while testifying in his own behalf. The record discloses that after the defendant had admitted having the liquor in question in his possession, and after having stated that he was not intending to sell it, but just keep it in order to ascertain whether he had the right to sell it or not, he was asked on cross-examination by the prosecuting attorney if it was not a fact that he had this kind of liquor in his possession before the time set forth in the information. Over the objections of his counsel that the question was not proper cross-examination, he was required to answer. His reply was: "Yes, sir." He was then asked if he had been selling this same kind of liquor called barley mead, and over his objections he was required to testify, and stated that he had been selling it, and that he had been keeping it in his place of business for sale. It is now contended that this was not proper cross-examination, and that it required the defendant to give testimony incriminating himself. We think the examination was entirely proper. One of the questions for the consideration of the

jury, according to defendant's own theory of the case, was whether or not his possession of the liquor was for the purpose of unlawful sale. He had voluntarily taken the witness stand in his own behalf, and had testified to his intention and purpose in regard to that matter. It was therefore proper for the state to prove by him on cross-examination that he had theretofore been selling it as a beverage as tending to show the real purpose of such possession. Again, having voluntarily become a witness in his own behalf, he was subject to the ordinary rules of cross-examination, the same as any other witness.

Complaint is also made of the fact that the state was allowed to introduce evidence tending to show that from time to time during the previous year certain persons had been seen in an intoxicated condition in the defendant's place of business. While this testimony was rather immaterial, it was apparently offered for the purpose of showing that the liquor in question which had been sold by the defendant was intoxicating in its effect. Taking this evidence in connection with the fact that the defendant had been openly selling this liquor under a claim that it was a nonintoxicant, this evidence was not only proper, but it was in no way prejudicial to the defendant's substantial rights.

Finally, it is contended that the court erred in not requiring the state to elect upon which of the two counts of the information it would rely for a conviction. In answer to this complaint it is sufficient to say that the counts were properly joined, and there was evidence before the jury tending to sustain the charge contained in each of them. It also appears that the case was submitted to the jury upon proper instructions, and the defendant was found guilty upon the first count of the information, and not guilty as to the second count. So it is apparent that he suffered no prejudice by the failure of the court to sustain his motion. In such a case the state will not be required to make an election.

A careful examination of the record satisfies us that

Callahan v. State.

the defendant had a fair and impartial trial, that he was not restricted in any manner in the presentation of his defense, and the judgment of the district court is therefore

AFFIRMED.

ROSE, J., not sitting.

DANIEL C. CALLAHAN V. STATE OF NEBRASKA.

FILED JANUARY 23, 1909. No. 15,688.

1. **Unlawful Disinterment: EVIDENCE.** In a prosecution against the superintendent of a cemetery for unlawfully assisting, inciting and procuring another to disinter human remains, where the evidence is that the accused had no knowledge of the disinterment, and the state relies upon general instructions to a person employed as a grave digger as constituting the inciting and assisting act, instructions in another and a particular instance are not sufficient to support a conviction.
2. ———: ———. Evidence set forth in the opinion *held* not to constitute such instructions to a laborer as to warrant a conviction in a case where it is shown that no knowledge of the disinterment was had by the superintendent until some time after the act had been performed.
3. **Witnesses: CROSS-EXAMINATION.** Cross-examination should be restricted to matters covered by the examination in chief.
4. **Criminal Law: INSTRUCTIONS: REVIEW.** Under the evidence set forth in the opinion, *held* error to submit the question to the jury as to whether the instructions given by the defendant to the laborer in the particular instance constituted a rule of action for future instances.

ERROR to the district court for Douglas county: WILLIS G. SEARS, JUDGE. *Reversed.*

Weaver & Giller and Hall & Stout, for plaintiff in error.

William T. Thompson, Attorney General, and *Grant G. Martin*, *contra.*

LETTON, J.

Patrick Callahan the plaintiff in error, was convicted of unlawfully and feloniously assisting, inciting and procuring one Clark to open a grave and dig up, disinter and remove from their place of deposit and burial the remains of the dead body of one ——— (name unknown), deceased, in January, 1905, without the knowledge and consent of the relatives or intimate friends of the deceased, and without lawful authority. Callahan was the superintendent of Prospect Hill Cemetery in the city of Omaha. This cemetery had been in existence for many years, and Callahan became its superintendent in 1890. The cemetery association was incorporated in 1892. Prior to the incorporation the cemetery was uninclosed, and, while interment had been made for many years prior to this time in and about the cemetery grounds, no records had been kept of the former burials, and many graves were unmarked and undistinguishable from the surrounding ground. When the corporation was formed a large number of iron markers were ordered by the association, and were placed by the superintendent at the head of each discernible grave, and thereafter records were kept by the association of each lot sold and of the location of each grave thereon. In 1905 one James C. Clark was employed as a grave digger by Mr. Callahan. Clark testifies that in January of that year, while he was digging a grave, he came upon a coffin inclosing the remains of a woman; that the coffin and remains were decayed and decomposed to such an extent that of the mortal remains the skeleton alone was left; that he removed the pieces of the skeleton, and laid them by the edge of the grave until he had dug the same to the required depth, when he replaced these remains in the bottom of the grave and covered them with earth. A number of shocking and repulsive details of his doings are given by the witness, and also by two members of his family who were present at the time. The evidence shows that at the place where Clark was digging the

grave there was no indication that the ground had ever been disturbed, and that neither he nor Callahan knew that there was or ever had been an interment at that place. The evidence also shows that Callahan had no knowledge that any remains had been disinterred or disturbed by the grave digger until a long time afterwards. The state bases its case, therefore, upon the proposition that prior to this time Callahan as superintendent had given Clark certain general instructions as to what he should do in the event that, while digging a grave, he should come upon human remains, that what was done in this instance was done in compliance with the general instructions or rule of action so laid down, and that, since Callahan gave such instructions he unlawfully aided, incited and procured Clark to disinter the remains and thereby committed the crime inhibited by the statute. Conceding the state's contention that general directions may render one giving them guilty of a specific crime, it will be seen, therefore, that Callahan's guilt under these circumstances rests entirely upon the proposition that his general instructions to Clark directed him to do the acts complained of, or, in other words, that Clark's unlawful acts were clearly within the scope of Callahan's directions. To determine this we must examine and scrutinize the evidence. Clark's testimony on this point is as follows: "Q. From whom did you have the instructions? A. From Mr. Callahan. Q. What were those instructions? A. The first one I went down on I said, when I got to the box—I went down to the office and talked to Mr. Callahan about that. He told me when I come to them to take them out nicely and lay them on the bank, and when I got the grave done down to where I wanted it, to dig a hole in the bottom and put those remains all back and cover them over nicely. Q. That was when you first encountered? A. Yes, sir; that was the first one I struck. Q. What did he say with reference to what should be your conduct whenever you met with that sort of an obstruction? A. He didn't give me any other orders. I went

right ahead with my work and asked him no more questions." This evidence was not as to the grave the desecration of which is charged but refers to another grave which Clark dug, in which remains were found. On cross-examination he testifies: "Q. You say, then, you had worked up there a day before you came across some bones, or some remains? A. Yes, sir. Q. And you went to see Callahan at the office? A. Yes, sir. Q. And you asked him what was done in a case of that kind? A. Yes, sir. Q. And he told you that orders were to simply take those bones out, those remains, and go on with your grave, and then put them back in? A. He didn't exactly speak it in that way, but he meant it in that way from the way he talked. He told me in a case of that kind we took them out and put them in the bottom of the grave again and covered them up. Q. You were speaking about this particular grave you had then? A. The first one I went into; yes, sir. Q. You were talking about what to do in that particular instance? A. Yes, sir." He further testified that Callahan knew nothing about this act with which he is charged with inciting until some time after it had been done.

The testimony above set forth contains all the instructions given to Clark by Callahan, according to Clark's own testimony. This is all there is in the record to sustain the allegations of the information as to Callahan's aiding, inciting, assisting or encouraging Clark to perform the act charged. At the close of the state's case, defendant moved for an instructed verdict, which motion was overruled and exception taken. We are of the opinion that the motion should have been sustained. Viewed in the most favorable light for the state, Clark's testimony falls short of establishing the fact that any general instructions were ever given to him by Callahan which authorized the removal and reinterment of the remains found in the excavation or the revolting acts described by him. It was, no doubt, necessary to admit the repulsive details of the act in evidence in order to establish that

the substance of the principal crime had been committed, so that evidence of the procurement or inciting of the act by Callahan might be introduced. The nature of the testimony was such as to shock the minds of all normally constituted persons, and it was liable to excite hostility and prejudice in the minds of the jurors toward any person accused of being guilty of such acts or of their procurement. There was the more reason, therefore, that the evidence by which it was sought to establish the connection of the accused with the principal act should be closely scrutinized; and, if it failed to establish such connection, the case should not have been permitted to go to the jury. We are of the opinion that Clark's evidence failed to establish that Callahan aided, assisted, incited or procured Clark to disinter the remains of the unknown person as charged in the information.

According to the testimony introduced upon the part of the defendant, before Callahan was permitted to open a grave for the purpose of interment or for the removal of a body previously interred, it was necessary for him to obtain a permit from the office of the secretary of the cemetery association, and also one from the board of health. He denies that he ever gave any general instructions with reference to the disinterment or reinterment of remains found in digging graves, but says that, upon one occasion when such an incident occurred, he brought Judge Baldwin, who was then the president of the cemetery association, to the grave, and that Baldwin in his presence gave instructions to a grave digger as to the particular instance. He testifies that he is not able to recall which grave digger it was and whose remains were being interred. He denies specifically giving any such instructions as Clark recites, either to Clark or to any other person, and swears that he knew nothing about this particular exhumation until he was charged with it in the police court about three years after the time that Clark disturbed the remains. Upon cross-examination the accused was asked whether after he heard Judge Baldwin's

instructions he pursued that course wherever he encountered the same conditions. Objection was made to this and subsequent questions of this nature, which were overruled, and the witness was required to answer as to his actions in that regard. We think that the overruling of these objections was erroneous. The defendant was upon trial for inciting Clark to disinter the remains of an unknown person in January, 1905. The state was only entitled to cross-examine upon the facts testified to by Callahan bearing upon this charge, and it was prejudicial error to compel the witness to answer a question relating to other acts of like nature as to which he had not been examined in chief, of which he was not accused, and the tendency of which question might be and probably was to arouse a prejudice against the defendant.

Complaint is made of the submission to the jury by the court in its instructions of the question whether the directions given by Callahan to Clark formed "a rule of action in future instances." From a consideration of the testimony, we think this criticism is well founded, and that there is no actual proof that any instruction given by Callahan was intended as a rule of action for Clark to follow in future instances. It is true Clark says that he acted upon this theory, but this is not enough. We cannot sustain a conviction upon mere inference or suspicion; the inciting act must be proved, and this is especially true where proof of knowledge by the accused of the wrongful act of the alleged agent is entirely wanting.

While we cannot sustain this conviction, we think enough has been shown in the case to justify the belief that the authorities in charge of Prospect Hill Cemetery have not exercised the careful supervision and control over its employees which is necessary where new burials are made in an old cemetery. The statute is designed to protect the last resting place of the dead, and graves should not be disturbed unless the case falls within the exceptions provided for by the statute. It is very probable that this prosecution may serve a useful purpose by

In re Estate of Wilson.

ending a careless and unlawful practice and abuse. A number of other questions are raised in the briefs, but in the view we take of the case it is unnecessary to consider them.

For the errors pointed out, the judgment of the district court is

REVERSED.

ROSE, J., not sitting.

IN RE ESTATE OF WILLIAM W. WILSON.

GEORGE E. HIBNER, ADMINISTRATOR, APPELLEE, v. J. R. WILSON ET AL., APPELLANTS.

FILED JANUARY 23, 1909. No. 15,459.

1. **Executors and Administrators: ACCOUNTING: APPEAL.** H. in his report as administrator of an estate claimed compensation for services. Said item was allowed in part and the remainder of his account approved. H. gave notice that he would appeal from the order diminishing his said claim, and gave a bond which referred solely thereto. *Held*, That the transcript filed in the district court did not bring up the entire account for review.
2. ———: **COMPENSATION: LEGAL SERVICES.** H., being an attorney at law, performed legal services in the administration of said estate. *Held*, That, if such services were necessary for the proper administration of said estate and beneficial thereto, the court in its discretion might allow the administrator reasonable compensation therefor.
3. ———: ———: **EXTRAORDINARY SERVICES.** For services rendered by H. in a business way, such as collecting rents of real estate, paying taxes thereon, insuring property, and attending to repairs, it was within the discretion of the court, if the evidence established that such services were extraordinary, to allow H. a reasonable compensation.
4. ———: ———: **APPEAL: TRIAL BY COURT.** In the district court the claim should have been tried without the assistance of a jury.
5. **Case Distinguished.** *Sheedy v. Sheedy*, 36 Neb. 373, distinguished.

APPEAL from the district court for Lancaster county:
ALBERT J. CORNISH, JUDGE. *Reversed.*

Mockett & Mattley, John M. Stewart, Robert Ryan and A. M. Harrah, for appellants.

Tibbets & Anderson, contra.

Root, J.

This is an appeal from a judgment of the district court allowing plaintiff compensation for his services as administrator of the estate of William W. Wilson, deceased.

1. The estate consisted of two farms, three business buildings in the city of Lincoln, and choses in action amounting to \$13,000, consisting of bank credits and promissory notes. Plaintiff claimed \$2,775 for extraordinary services rendered in a business capacity and \$2,000 fees as an attorney at law. The county judge allowed plaintiff but \$2,000 for attorney fees and extraordinary services, and otherwise approved his account. Plaintiff thereupon gave notice of appeal "from the order of the court of June 26, 1906, in which the court fixes the compensation of this administrator for services rendered at two thousand dollars (\$2,000), and the said George E. Hibner administrator prays the court to fix appeal bond on such appeal." The bond recites that the appeal is from the action of the court on Hibner's claim for compensation.

It is claimed by the heirs that the district court should have submitted to the jury every contested item in the administrator's account, whereas plaintiff claimed, and the district court held, that the record presented for consideration only the question of plaintiff's compensation. The appeal only transferred to the district court the controversy over the administrator's compensation. Although such claim was but part of the account, yet it was segregated as to subject matter and form. The remainder of the account relates to alleged disbursements by the administrator, and inquiry concerning the legality thereof would not involve a consideration of the value of the ad-

administrator's services or the amount that he should be allowed therefor. If the heirs were dissatisfied with the action of the county court, they could have appealed generally and presented their complaints to the district court. *St. Paul Trust Co. v. Kittson*, 84 Minn. 493. The contrary view has been taken by the supreme court of Michigan in *Showers' Estate v. Morrill*, 41 Mich. 700, but the position of the Minnesota court appeals to us as better supported in reason and more likely to facilitate the transaction of business in our district courts. *Ribble v. Furmin*, 69 Neb. 38, 71 Neb. 108, cited by defendants, does not rule the instant case. In the cited case a belated creditor sought to have time extended so that he might file a claim against an estate. The county court denied the request, and on appeal to the district court the order of the county court was vacated and permission given the creditor to file his claim in the lower court. We held that the appeal brought the entire subject matter concerning the proposed claim to the district court. The claim in the *Ribble* case was a distinct controversy between the claimant and the representative of the estate. In the instant case the claim of the administrator for compensation is as clearly separate from the other part of his account.

2. It is contended that the administrator was not entitled to compensation other than the fees allowed by section 283, ch. 23, Comp. St. 1907. The succeeding section, however, permits such further allowance as the probate judge shall deem just and reasonable "for any extraordinary services not required of an executor or administrator in the common course of his duty." Defendants insist that many of the services for which plaintiff was given compensation were neither extraordinary nor out of the common course of his duty as such official, and that some of them did not relate to the administration of said estate. To some extent the claim is well founded. The estate, while considerable, was free from debt. After Hibner's appointment an attempt was made by interested parties to probate an alleged lost will of the deceased

wherein Hibner had been designated as executor. The litigation continued some time, and terminated in favor of the contestants. Mr. Hibner appeared as a witness for the proponents in said litigation, and claims to have given considerable attention to the case in the interest of the estate. Such conduct was entirely voluntary. Mr. Hibner was an officer of the county court, and had no proper concern with the outcome of the litigation over the will. If the will had been allowed, it would have been his duty as administrator to account to himself as executor. As it was defeated, he merely continued his duties as administrator. Pending the settlement of the estate Mr. Hibner brought an action for one of the heirs for a partition of the real estate of which Wilson died seized, and all parties interested were impleaded therein. Thereupon various of the heirs claimed that some of said litigants had received advancements from the deceased, and asked to have an accounting with regard thereto. It was charged that \$5,000 had been advanced to Mr. Hibner's client, and plaintiff defeated that claim. He also succeeded in having an advancement of less than \$2,000 charged against one of the other heirs. For none of those services should he, as administrator, be allowed compensation. All of the debts and funeral charges had then been paid. The deceased was not survived by a widow or any children. There were more than sufficient funds in the administrator's hands to pay all costs of administration, and he did not have any duty as such official to perform in said action, except to file a disclaimer if impleaded as a party therein. Plaintiff also claimed compensation because various of said heirs had frequently called at his office and talked with him about the estate and thereby secured his counsel. We do not understand that Mr. Hibner was thereby rendering the estate any service within or without the course of his duty. His duties were simple and easily understood—to collect the assets and rents, preserve and protect the estate, resist unlawful claims, and pay out

money on the order of the court or for the useful purposes of administration.

Plaintiff charged the estate \$2,000 for legal services rendered. Defendants assert that plaintiff is not entitled to any compensation therefor, but we do not agree with them. The property of the estate was worth \$80,000 and, if the administrator had been a layman, common prudence would have dictated that he secure counsel to assist him in said settlement. To the extent that such services were necessary and beneficial to the estate, he could have charged the estate therefor. *Marshall v. Piggott*, 78 Neb. 722; *Estate of Rapp v. Elgutter*, 77 Neb. 674. Section 284, ch. 23, Comp. St. 1907, authorizes the probate judge to allow for services extraordinary in their character and out of the common course of the duty of the administrator. While it would have been within the course of plaintiff's duty to have secured the services of an attorney, it was not within that duty for him to perform those services himself, and in the discretion of the court he may be allowed therefor. *Wisner v. Mabley Estate*, 74 Mich. 143. Plaintiff in his official capacity is a trustee and an officer of the court. *Henry v. Henry*, 73 Neb. 746. In such case, where the trustee seeks to charge the trust funds in his possession for his services, his claim should be closely scrutinized and the benefit of all doubt given to the estate.

3. As to the \$2,775 claimed by plaintiff for extraordinary services rendered by him as a business man in securing tenants for the property, collecting rents, attending to repairs, securing insurance, hiring janitors, paying taxes, and looking after a heating plant used jointly by the estate and the First National Bank, we are of opinion that some allowance may be made in the discretion of the court therefor. No hard and fast rule can be laid down to govern all cases, nor can we do more in the instant one than to say that the trial court should exercise a wise discretion, so that neither the heirs of the decedent on the one hand nor the officer of the probate court on the other will be dealt with unjustly in this matter. In the instant

case the administrator seems to have exercised most commendable diligence and to have collected some \$15,000 in rentals without any loss to the estate, and no injustice will be done defendants by making a reasonable allowance to him therefor. *Ivey v. Coleman*, 42 Ala. 409; *Estate of Beideman*, Myr. Prob. Rep. (Cal.) 66; *In re Estate of Wolfe*, 4 Ohio N. P. 336. It is evident, however, that the administrator was permitted to recover for services that should not have been charged against the estate.

4. As this case must be reversed, we suggest that the issues joined should be tried by the court, and not submitted to a jury. The subject matter of the litigation relates solely to remunerating an officer of the court for the transaction of its business. *Ford v. Ford*, 88 Wis. 122; *Schinz v. Schinz*, 90 Wis. 236; *In re King's Estate*, 113 Mich. 606. Unsatisfactory results will ordinarily follow submitting that question to a jury. Although we held in *Sheedy v. Sheedy*, 36 Neb. 373, that, on appeal from an order of the county court fixing a widow's allowance, either party was entitled to a jury trial, that rule does not apply in the instant case, nor will it control in the settlement of executors' or administrators' accounts, which, when resisted, present an accounting merely, to be determined by the judge, and not by twelve men who would not have the proper data before them or facilities for ascertaining and striking a proper balance.

The judgment of the district court, therefore, is reversed and the cause remanded for further proceedings.

REVERSED.

REESE, C. J., dissenting.

It is my opinion that the appeal of the administrator from the allowance of a part of his account opened up the whole question of the correctness of said account and that the district court erred in limiting the investigation to the one question of his compensation.

DEAN and ROSE, JJ., concur.

WILLIAM FOUSE V. STATE OF NEBRASKA.

FILED JANUARY 23, 1909. No. 15,789.

1. **Criminal Law: ROBBERY: EVIDENCE.** In a prosecution for robbery, it was proper for the state to prove that in the afternoon of the day that deceased was killed and robbed, and preceding the time he left his abode for the city where he was killed, he had considerable money in his possession, even though no part thereof is traced into the possession of defendant.
2. ———: **REVIEW.** An answer responsive to a question should not be stricken from the record.
3. ———: **TRIAL: DISCRETION OF COURT.** It is within the discretion of the trial court to permit a witness used by the state on rebuttal to testify, even though all witnesses were ordered excluded from the court room, and said witness had not obeyed the rule.
4. ———: **MOTION FOR NEW TRIAL: AMENDMENT: REVIEW.** This court will not review an order made by a district court refusing a defendant permission to file an amendment to his motion for a new trial, where such application is made more than three days after the return of verdict.
5. ———: **INSTRUCTIONS: CONFESSIONS.** A statement freely and voluntarily made by a defendant not induced by threats or promises, wherein he admits that he had participated in the main facts essential to constitute the crime for which he is being tried, may properly be referred to by the court as a "confession."
6. ———: ———: **REVIEW.** If the evidence does not tend to prove that defendant, at the time he committed the acts complained of, was intoxicated to such a degree as to interfere with his judgment and understanding, and defendant testified clearly and plainly to the transaction, and claimed that he acted in self-defense, this court will not examine an instruction whereby the trial court submitted to the jury the defense of intoxication.
7. ———: **CONFESSIONS.** The court may permit a police officer to testify concerning statements made to him by defendant, even though such defendant at said time was handcuffed and in the custody of said officer, where it is apparent that the statement was voluntary, and not induced by threats or promises.
8. ———: **VIEWING PREMISES: DISCRETION OF COURT.** It is entirely within the discretion of the trial court to order, or refuse to permit, the jury to inspect the scene of the alleged crime.

ERROR to the district court for Douglas county: WILLIS G. SEARS, JUDGE. *Affirmed: Sentence reduced.*

Frank Crawford and Henry G. Meyer, for plaintiff in error.

William T. Thompson, Attorney General, and George W. Ayres, contra.

ROOT, J.

One Joseph Bowles came to his death as the result of an assault committed during the night of December 11, or the early morning of December 12, 1907. William Fouse, who will be referred to hereafter as the defendant, was informed against for causing said death while perpetrating a robbery. From a conviction, which resulted in the death penalty, defendant has appealed. Counsel advance various reasons for reversing said judgment.

1. That the court erred in permitting a witness to testify that between lunch and 4 o'clock of December 11 he noticed that Bowles had money in his possession. Bowles was a soldier stationed at Ft. Crook, which is about 12 miles from the city of Omaha where the crime was committed. Bowles came to Omaha from Ft. Crook, and was dissipating in a disreputable part of said city that afternoon and the following night. While it is not shown by direct evidence that defendant secured any money from the person of the deceased, yet there is evidence that defendant was with Bowles during the afternoon and evening of December 11, and we think the reception of said evidence was proper.

2. The witness Savage, who had charge of the detective force of the city of Omaha, testified for the prosecution that in a conversation with defendant he referred to the fact that said prisoner's coat was stained with blood, and told him, "You must have murdered that man," and in response defendant, after some hesitation, said, "I will

tell the truth," and told his story. Counsel moved to strike out the latter part of said answer as not responsive to the question, which the court overruled. The answer was responsive, and the court did not err.

3. It is claimed that one Julia Rose, a witness for the state on rebuttal, should not have been permitted to testify because the court had entered a rule that all witnesses should be excluded from the court room, and that she remained after said order was made, and heard other witnesses testify, and that the court also erred in refusing to permit defendant to prove said fact. Assuming that said witness was in the court room, which she denied, it was within the discretion of the court to permit her to testify. *Bone v. State*, 86 Ga. 108.

4. That the court erred in refusing to permit defendant to amend his motion for a new trial. The application was made more than three days after return of verdict, and the ruling of the court was right. *Lillie v. State*, p. 268, *post*.

5. That the court erred in giving instruction numbered 15. Therein the court advised the jurors that a confession freely and voluntarily made by a defendant may be received in evidence, but that it was insufficient in itself to convict him, and should be received with great caution. Defendant had signed a writing wherein he admitted striking Bowles on the head with a brick, but claimed that he acted in self-defense, but admitted that he had taken Bowles' watch and knife. Defendant denied making that part of said statement relating to the taking of personal property from the body of the deceased. Strictly speaking, the statement was not an admission that defendant had committed the crime, but there was evidence of oral statements made by deceased at other times, to which the instruction would to some extent apply. Moreover, the statement was in a sense a confession, as it connected defendant with many of the main facts essential to constitute the crime charged in the information, and the in-

struction, in view of all of the evidence in this case, was not erroneous. *Austin v. State*, 15 Tex. App. 388.

6. It is urged that the court should not have permitted the witness Donohue to testify to a statement made by defendant during the time said witness was accompanying defendant from the coroner's inquest to the jail. Donohue, who is a policeman, stated that Fouse, without any threats or promises made to him, asked the witness if he thought that, if defendant pleaded guilty, he would get off with a life sentence in the penitentiary. Counsel suggest that, as Fouse was then handcuffed and in custody of the officer, his statement was not voluntary, and that Fouse testified that he had been threatened with great bodily violence unless he did confess. At the time the court admitted Donohue's testimony Fouse had not testified and a sufficient foundation was laid for the introduction of said testimony. Moreover, the court instructed the jurors that they should receive all of the testimony given by policemen and detectives with great caution, and that a confession should not be considered unless made voluntarily, and not under the pressure of threats or promises. The testimony was properly admitted.

7. Counsel contend with great fervor that instruction numbered 13, given by the court, is erroneous. Therein the court assumed to instruct the jurors concerning the defense of intoxication. It is not necessary to ascertain whether it gave defendant the benefit of the law upon this subject, because we are satisfied that the evidence did not warrant submitting that defense to the jury. Defendant was a witness in his own behalf and detailed the transaction, claiming self-defense. While he states that he was intoxicated, he does not claim that he did not know what he was doing. The testimony of the woman to whose house defendant went immediately after his encounter with Bowles shows clearly that Fouse requested admission and shelter because he was cold and had been drinking, and it is related that the woman's girl stated that defendant was then drinking. Something like an hour or

two thereafter this woman did go to defendant's aid, and found him stupid and thereupon, with the aid of a companion, she dragged him into her room, and prepared a pallet, whereon he slept until the morning, but there is not a particle of evidence that even suggests that Fouse at the time he killed Bowles did not know or appreciate the nature of said act or that he was incapable of forming an intent to rob his victim. Whatever benefit defendant received from said instruction was more than he was entitled to under the facts, and he ought not to complain.

8. It is suggested that the court abused its discretion in not permitting the jurors to visit and inspect the scene of the crime. There is a conflict in the testimony as to whether or not at said point there were bricks lying on or imbedded in the ground. This fact is important as tending, possibly, to explain that defendant did not carry to said location the brick used by him. The court had suggested that the jurors would be permitted to view said premises, but later refused to permit such examination. Counsel say that they relied on said promise, and did not prepare themselves with rebuttal testimony on said point. The jurors were permitted to inspect photographs taken December 13, which advised them quite fully as to the condition of said premises. Testimony pro and con on said subject was also given, and a view of the premises would have furnished cumulative evidence only, confused with evidence as to whether or not conditions were the same at said point as at the time Bowles was killed. The court did not abuse its discretion in ruling as it did.

9. It is most strenuously argued that the verdict is not sustained by the evidence. The testimony is conclusive that Bowles came to his death as a result of blows inflicted by some blunt instrument on his head. Defendant admits that he engaged in an altercation with the deceased and struck him at least two severe blows on the head, and that he employed a brick for that purpose, and left deceased senseless on the ground during a cold night in February. Defendant made no attempt to succor de-

ceased or to notify any person of Bowles' precarious condition. The following day a watch and knife, the property of Bowles, were found in defendant's possession. It is true that defendant testified that Bowles had assaulted and cut him with a knife because he did not comply with a request made by Bowles, and that the watch and knife were put in defendant's pocket by a colored man who has since said date left the state. From the evidence, the jury might, logically find as they did, that defendant assaulted Bowles for the purpose of robbing him, and that he carried out his purpose. The verdict is sustained by the evidence.

10. It is suggested that the death penalty ought not to be inflicted, and all members of the court participating in this decision are agreed with counsel on this point. The crime was committed in that part of Omaha inhabited by degenerates, white and colored, and where an intoxicated person would not be safe were it known, or suspected, that he had any money in his possession. Bowles had been drinking in the saloons and visiting houses of ill-fame in the afternoon and evening of the day he was killed. He had money when he started on said trip, and expended a part thereof in those places, and this fact and his condition was manifest to many individuals in that quarter. It is possible, although not probable, that defendant did not kill the deceased, or that Bowles was the aggressor, or that robbery was an afterthought. There is considerable evidence in the record tending to prove that Fouse was an industrious man and generally bore a good reputation as a law abiding citizen.

For the foregoing reasons, the judgment of conviction is affirmed, but the penalty is changed to imprisonment in the state penitentiary at hard labor during the natural life of defendant.

AFFIRMED: SENTENCE REDUCED.

ROSE, J., not sitting.

HOMER FOSTER V. STATE OF NEBRASKA.

FILED JANUARY 23, 1909. No. 15,848.

1. **Criminal Law: SERVICE OF COPY OF INFORMATION: WAIVER.** An information was filed with the clerk of the district court charging that F. had committed a felony, and the same day he pleaded not guilty. A copy of said information was not delivered to F., but thereafter he procured an order of the court for compulsory attendance of witnesses and permission to take depositions. Three months later a jury was impaneled and sworn in said case, and after the state had called a witness and propounded three questions, F. for the first time objected that he had not been furnished a copy of said information. *Held*, That the court did not err in overruling said objection.
2. ———: **COUNSEL: APPOINTMENT AFTER PLEA.** The court did not appoint an attorney for F. until after he had entered his plea of not guilty. *Held*, That it was not error to thus receive said plea.
3. **NEW TRIAL: MISCONDUCT OF JURY.** After submission of the case, and while the jurors were in charge of a bailiff, five of them were permitted to remain in a room with locked doors, and the remaining seven were taken by said bailiff to a toilet room. One of said jurors returned in advance of his companions. It affirmatively appeared that no one approached any of the jurors or communicated with them concerning said case. *Held*, Not misconduct of the jury or irregularity in the proceedings sufficient to justify a new trial.
4. **Robbery: EVIDENCE: SUFFICIENCY.** The evidence disclosed that defendant and one S. were strangers to each other until December 5, and that after dark of said day they were together at a small railway station; that each to the knowledge of the other had a small sum of money; that defendant demanded that S. should "dish up" or "divy up," saying also "hands up," and received two or three silver dollars which S. handed to him. *Held*, That a verdict of guilty of robbery from the person is sustained by the evidence, although S. later attacked and wounded defendant and recovered his money, and the evidence further established that each party was at said time somewhat under the influence of intoxicating liquor.

ERROR to the district court for Cass county: HARVEY D. TRAVIS, JUDGE. *Affirmed*.

Matthew Gering and A. L. Tidd, for plaintiff in error.

William T. Thompson, Attorney General, and George W. Ayres, contra.

Root, J.

Defendant was convicted of committing the crime of robbery from the person, and from the minimum sentence of three years appeals to this court.

1. It is argued that defendant should not have been tried because he was not furnished a copy of the information, as required by section 436 of the criminal code. The objection is without merit. The statute was enacted for the wise and beneficent purpose of advising a defendant of the nature of the charge against him, and to give him at least 24 hours to prepare to plead thereto. The alleged crime was committed December 5, 1907, and within a few days thereafter defendant was arrested and given a preliminary examination, at which time he was represented by counsel. December 16 defendant was arraigned in district court and entered a plea of not guilty. Prior to that date the deputy clerk of the court had presented a copy of the information to said attorney, who handed it back to that official, with the statement that he did not then represent the accused. December 26 defendant entered into a recognizance for his appearance at the next term of court, and on the 15th day of February, 1908, made an affidavit to be used in securing an order for compulsory process and the taking of depositions, wherein he swore that the information charged him with the crime of robbery from the person. The court's attention was not challenged to the fact that a copy of the information had not been served on defendant until after a jury had been impaneled, a witness sworn, and three questions propounded. The objection was overruled, as it should have been. The right to have a copy of the information is one that a defendant may waive. *Barker v.*

State, 54 Neb. 53. By his conduct defendant waived all right to object to his situation.

2. That the court erred in neglecting to appoint counsel for defendant prior to his arraignment. The record does not disclose just when counsel was appointed, but we assume that it was subsequent to the entry of defendant's plea. Doubtless, had counsel desired to present any defense other than "not guilty," the court would have permitted defendant to have withdrawn his plea for that purpose; but the record does not disclose such request. Moreover, the certified record which defendant has presented for our consideration recites that he was accompanied by his attorney when he entered said plea. The objection is without merit.

3. That there was misconduct of the jurors in escaping from the custody of the bailiff while considering of their verdict, and in separating from each other after the submission of the case. The facts as we glean them from the bill of exceptions, seem to be that the jurors were confined in a room on the third floor of the court house; that the toilet room was in the first story of said building, so that it became necessary from time to time to take the jurors from one room to the other; that on one occasion seven of said jurors were taken by the bailiff to said toilet room, leaving the other five jurors in a room on the third floor. On returning, one of the seven jurors was some distance in advance of his companions, and stood beside the door to the jury room waiting for the bailiff to unlock the same. It affirmatively appears that no one communicated with said jurors during said time, and there could not have been any possible prejudice to the defendant, unless the mere separation of the jurors under the aforesaid circumstances as a matter of law invalidated their verdict, which was later rendered. Under the facts defendant was not prejudiced. *Spaulding v. State*, 61 Neb. 289.

4. Finally, it is urged that the verdict is not supported by the evidence. Because of the severity of the law

which compels a sentence of at least three years' imprisonment if a defendant is found guilty, we have carefully read all of the evidence, and feel an abiding conviction that the jurors were justified in returning a verdict of guilty. Defendant and one Smith met as strangers in Omaha, and went together to South Bend, some 30 miles distant, for the purpose of securing work. Not receiving much encouragement, they determined to leave said village that night. Both Foster and Smith had been indulging in intoxicating liquors and each was possessed of a small amount of money, of which fact the other had cognizance. While waiting outside the station for a train, defendant admits that he demanded Smith to "dish up" or "divy up." Smith says that defendant also ordered "hands up," and placed his hand back toward his hip pocket, whereupon Smith delivered three or four silver dollars to defendant, but later drew a pocket knife and attacked Foster, wounding him, recovered Smith's money, and then took defendant into custody and delivered him to the village authorities. Defendant on cross-examination stated that he only referred to a bottle of whiskey in Smith's pocket, and had no intention of securing money from his companion, but later admitted that he wanted 50 cents that he claimed to have lost, and suspected that Smith had taken. Smith is corroborated by the witness Fountain in many important particulars, and, after all is said, the record on this point presents simply a question of veracity of witnesses, which it was the jurors' peculiar province to determine. If they believed Smith's testimony and rejected that given by defendant, as they had a right to do, the verdict is sustained by the evidence.

No complaint is made concerning the instructions. There is considerable evidence in the record tending to show that defendant bore an excellent reputation for honesty and as a law-abiding citizen in the neighborhood of his old home and that of his parents in Kansas. He has traveled extensively, but seems to have been indus-

Lillie v. State.

trious, and, when not under the influence of intoxicating liquor, trustworthy and honest. We regret that we cannot reduce his sentence to one year in the penitentiary, but under the statute under which he was convicted we are powerless in the premises.

The record is without error, and therefore the judgment of the district court is

AFFIRMED.

ROSE, J., not sitting.

JAMES LILLIE V. STATE OF NEBRASKA.

FILED JANUARY 23, 1909. No. 15,928.

1. **Criminal Law: INFORMATION: JOINDER: ELECTION.** If the state joins in one information three separate counts, charging robbery, assault with intent to commit robbery, and an assault with intent to do great bodily harm, and all counts refer to the same transaction, the defendant is not prejudiced if, before he introduces any evidence and as soon as the matter is brought to the court's attention, it compels the state to elect whether to prosecute on the first and second or upon the third count.
2. ———: **MOTION FOR NEW TRIAL: AMENDMENT: REVIEW.** More than three days after the return of the verdict defendant by leave of court complained of the court's failure to give an instruction tendered by defendant. He did not claim that he was unavoidably prevented from including said assignment in his motion for a new trial, which was filed within time. *Held*, That the refusal of the court to grant a new trial for any reason set out in said amendment will not be reviewed in this court.
3. ———: **NEW TRIAL: NEWLY DISCOVERED EVIDENCE.** A new trial will not be granted for newly discovered evidence that is cumulative, unreasonable and incredible, and was known before trial to defendant's brother, who was in the county and immediate neighborhood of the crime at the time it was committed and until trial.
4. ———: **EVIDENCE: IDENTIFICATION OF ACCUSED.** Where the complaining witness positively identified the accused as his assailant, and his testimony is sustained by many facts established by dis-

Lillie v. State.

interested witnesses and the subsequent conduct of the accused, the verdict will not be set aside because of defendant's denial corroborated by an alibi sought to be established by the testimony of a nephew and niece.

ERROR to the district court for Gage county: JOHN B. RAPER, JUDGE. *Affirmed.*

L. Crocker and W. H. Ashby, for plaintiff in error.

William T. Thompson, Attorney General, and Grant G. Martin, contra.

ROOT, J.

Defendant was convicted of committing the crime of robbery from the person, and, from a sentence of eight years' confinement at hard labor in the state penitentiary, he appeals.

1. The first count in the information charged defendant with robbery from the person, the second with making an assault with intent to commit a robbery, and the third an assault with intent to commit great bodily injury. On the 24th day of March, 1908, a jury was impaneled to try the issues joined by defendant's plea of not guilty, and the same day defendant filed a motion that the state be required to elect whether it would prosecute defendant upon the first and second or the third count in said information. The following day the motion was presented to the court and sustained. Whereupon the state elected to proceed under the first and second counts. It may be doubted whether the court should have sustained the motion, as the alleged crimes all grew out of the same transaction. *Jackson v. State*, 39 Ohio St. 37; 1 Bishop, New Criminal Procedure, sec. 449; *Miller v. State*, 78 Neb. 645. Conceding, for the sake of argument, that the counts charged separate and distinct offenses, defendant might have been lawfully tried therefor unless he made seasonable objections thereto. (1 Bishop, Criminal Procedure, sec. 449); and, the court having ruled in favor of

defendant as soon as the motion was presented and before he had commenced his defense, the accused is without standing to complain in this court.

2. It is argued that the court erred in refusing instruction numbered 3 requested by defendant. While the instruction was proper, its subject was much the same as that of the eleventh instruction given by the court on its own motion. Defendant did not assign the action of the court in refusing to give said instruction as error in his motion for a new trial but more than three days after the return of the verdict was given permission to, and did, file an amendment to said motion and therein made such complaint. Defendant did not claim that he was unavoidably prevented from filing said assignment within three days and the ruling of the court thereon is not subject to review. *Davis v. State*, 31 Neb. 240; *Willis v. State*, 43 Neb. 102; *Aultman, Miller & Co. v. Leahey*, 24 Neb. 286; *Gullion v. Traver*, 64 Neb. 51; *State v. Dusenberry*, 112 Mo. 277; *State v. Hunt*, 141 Mo. 626.

3. Defendant asserts that a new trial should have been granted because of the discovery, subsequent to the return of the verdict, of material evidence. This assignment is supported by the affidavit of George Lillie, a brother of the accused, who stated that on the evening of December 11, the day the crime was committed, he was working for his mother at a point south of the scene of the crime; that about dark he heard shouting and the discharge of firearms in the direction of Frank Lillie's place, and soon thereafter two men on horseback rode out of Frank Lillie's pasture into the highway, which runs north and south, and galloped south; and that he had never disclosed those facts to his brother because he apprehended trouble from the Martins. The statement does not seem reasonable, and it seems incredible that affiant would have kept this knowledge locked within his own breast while his brother was on trial. Defendant and his counsel testified that they did not know of said facts until after verdict but we do not think that there was a show-

ing of diligence on their part. Affiant does not state that either of the horsemen were strangers, and, for all his affidavit advises us, one of them may have been the defendant himself. Criminal trials would never end if immediate relatives of an accused may wait until after verdict and then come forward with disclosures of evidence, and a new trial be granted.

4. It is claimed that the evidence does not sustain the verdict. We have read the evidence with great care, and to our mind the verdict of the jury is the only one that should have been returned thereon. Thomas Martin had supped with Frank Lillie, a brother of, and with the accused, and stated to them that he had cashed his pension check that day. About dusk the accused with three of his brother's children started for church some two miles distant. Martin lingered from 15 minutes to half an hour, and started home in the direction traveled by the accused, and was assaulted, beaten and robbed within 150 yards of Frank Lillie's home. Martin testified positively that he recognized defendant as his assailant. Defendant arrived at church something like a half hour subsequent to the arrival of his nephew and nieces, and five witnesses noticed blood on his hands and the cuffs of his shirt. Subsequent to the transaction defendant concealed himself, and later fled to the state of Washington, from whence he was extradited. Defendant, his nephew and one of said nieces stated that James Lillie rode in the buggy until within 70 yards of the church, at which point he alighted for the purpose of vomiting; that the children drove on, and that defendant followed them some five or ten minutes later. One of the nieces did not testify, nor is any explanation given for her absence, and the nephew stated to the sheriff in the presence of his deputy the day after the crime that his uncle got out of the buggy over a mile from the church, and within less than a fourth of a mile of the point where Martin was robbed. There is evidence in the record that Martin has made contradictory statements concerning the person who assaulted and robbed him, and

Shults v. Chicago, B. & Q. R. Co.

there is some evidence tending to corroborate defendant's testimony, but the credibility of the witnesses was for the jury, and not this court, to pass upon.

The court fairly instructed the jury, and the judgment is

AFFIRMED.

ROSE, J., not sitting.

WALTER O. SHULTS, APPELLEE, v. CHICAGO, BURLINGTON &
QUINCY RAILWAY COMPANY, APPELLANT.

FILED JANUARY 23, 1909. No. 15,443.

Railroads: LICENSEE: DUTY OF LICENSOR. "Where one enters upon the premises of another with his consent, but without an invitation, and not in the discharge of any public or private duty, he is a bare licensee, and the occupier of the premises owes no duty to him as long as no wanton or wilful injury is inflicted upon him by the licensor or his servants." *Chesley v. Rocheford & Gould*, 4 Neb. (Unof.) 768, approved and followed.

APPEAL from the district court for Lancaster county:
LINCOLN FROST, JUDGE. *Reversed.*

*J. E. Kelby, Halleck F. Rose, Frank E. Bishop and
Fred M. Dewcese*, for appellant.

Shepherd & Ripley, contra.

FAWCETT, J.

On February 28, 1906, the yards of defendant in the city of Lincoln, in which freight trains were made up and freight cars weighed, consisted of a network of tracks, which, by reason of limited area, ran very close together. By reason of the large number of trains and cars handled in such yards, both night and day, it was a very busy place, and a very dangerous place for persons not familiar with the business of the yards. It was used exclusively for the purposes of defendant, and was not in any man-

ner open to the public. On the evening of that day, some time between 7:30 and 10 o'clock, the plaintiff went to the night yardmaster, and, as plaintiff testifies, "asked him if he could tell me where Kimballs' two cars were, and if I could get permission to go and see him; that I had some business to transact, and he told me they was over northeast. I believe he said X six, or six X, something. If they are not on that track, they are on the scale track, in the neighborhood. He said: 'You go down in there, and some of the hands will show you where they are.' I went down there, and got there without any accident. I was pretty cautious not to have any. I kept track of the tracks wherever I went across. * * * I found a man there with a brakeman's lantern. * * * I asked him where Kimballs was, and he said they were over in the car, and showed me the light in the car door. * * * I went right down to the car and got in. I found my cousins there." It seems that the Kimballs were cousins of plaintiff, and were shipping two cars of freight from Palmyra to York. One of the cars was what is called an "emigrant" car. In one end there were five horses and three mules, standing crosswise in the car, and tied to a piece of 2 by 4 spiked to the side of the car. The other end of the car contained farm implements and household effects. The middle of the car between the two side doors was a clear space where the Kimballs were riding, and where it appears they intended to sleep that night. The horses and mules were separated from the rest of the car by two pieces of 2 by 8 and two pieces of 2 by 4 timbers across the car, fastened with 20-penny spikes. After entering the car plaintiff and the Kimballs sat down and engaged in friendly conversation. About 15 or 20 minutes after they had seated themselves the car in which they were seated suddenly received a severe jolt by having other cars bumped against it, the result of which was that the horses and mules were thrown off their feet, their tie straps and ropes broken, and the animals precipitated

through the barricade, completely breaking it down. Plaintiff and his cousins testified that one of the mules fell across plaintiff and the other animals upon top of the mule, the result being that plaintiff was so severely injured that he was laid up for a number of months, and, as he claimed, was not entirely well at the time of the trial. The trial resulted in a verdict and judgment for plaintiff for \$1,000, from which judgment defendant appeals.

There is no dispute that plaintiff received the injury complained of, and in the manner above stated. Plaintiff argues that the shock to the car was so great as to show negligence on the part of the defendant. The testimony of the train crew doing the switching is that they had been weighing the cars upon that track. The weighing was done by pushing the cars up an incline to an elevation of some five or six feet, and, when the top of the elevation was reached, uncoupling them, one at a time, and permitting them by gravitation to pass down and over the scales, which weighed each car automatically as it passed over. The evidence also shows that, in order to permit a correct weighing by the automatic scales, a car must pass over it at a low rate of speed; that a speed of even five or six miles an hour would be so great that the scales would not correctly weigh the car. The members of the train crew all testified that on that evening, while handling and weighing the cars which caused the injury, the work was done in the usual and customary manner, no greater speed or bumping of cars occurring than was customary in the yards.

When both sides had rested, defendant moved the court to instruct the jury to return a verdict in favor of the defendant, which motion was overruled. The question as to whether or not the court erred in overruling this motion depends entirely upon the duty which defendant owed plaintiff at the time he received the injury complained of. The night yardmaster was called by defendant and interrogated as to what took place at the time plaintiff received his license to enter the yards. He says: "The gentleman

Shults v. Chicago, B. & Q. R. Co.

that came into my office asked me about a car that was shipped from Palmyra to York. Q. Anything said about who was with it? A. Well, not that question. That was the first question that the gentleman asked me, and I asked the bill clerk if we had anything of that description, and he said we had a car of emigrants that came in from Palmyra on 3, and that the car was going to York. So I then told the gentleman. I told the gentleman that the car was there, and he asked me where he could find it. He said that the car was shipped by his cousin, and that he wanted to see him, asked me about where the car would be situated, and I told him that the car would have to be weighed here, and it would undoubtedly be on X 6. Q. That the scale track? A. The scale track. At least, if it wasn't there now, it soon would be. Well, he said that he guessed he could find it all right, and he asked me was the scales situated where they formerly was near the same house, and I told him 'Yes,' and I said to him, I said, 'You belong with the car?' and he said, 'It is my cousin's car, and I want to see him.' He says, 'I live here in town, and they are shipping through, and I haven't seen him for some time, and I want to see him.' And I said, 'Well, you understand this is a very dangerous place here,' I said, 'for anybody to be prowling around through the yard.' Q. About what time was it? A. This was, I should say, about 7:30. I know I had just got done my little preliminaries for starting the men at work at 7 o'clock after coming to the office and sitting down to the desk. He said he realized that, and I said, 'If you go down into the yards, you go at your own risk,' and he smiled, and started out of the office; and I said, 'You are not even safe right here in the office.' I said that in a bantering way more than anything else, because I thought he was ignoring what I said to him. I said, 'You are not even safe right here in the office in the Lincoln yard.' With that he turned and went out of the office. I did not see the man again until he was taken out of the car."

Shults v. Chicago, B. & Q. R. Co.

Plaintiff on redirect examination, while testifying in chief, was asked this question: "Q. Did you have any conversation with this overseer or yardmaster, the man that directed you about the dangers of the place? A. Well, not only he said I would have to be pretty careful. Q. Were you careful? A. I was. As I stated once before, I went up between the tracks where the brake walks, so in case a collision or anything of that kind comes with the cars I would be out of danger." On recross examination he testified: "Q. You say that the man did warn you that that was a dangerous place? A. Yes; he said I would have to be careful. Q. Well, did he say anything more than that? A. Not that I recollect; no, not only giving me the directions. Q. But about the taking care? A. Sir? Q. About taking care, or about the risk of the place? A. No, sir; he didn't say anything, only he says you want to be careful, it is dangerous, something of that kind. Q. You don't pretend, then, to remember all that he said about that? A. Well, that is in the neighborhood of all he said." Plaintiff was placed on the stand in rebuttal, and testified as follows: "Q. Mr. Shults, when you went into the yard office and asked permission to go out to these cars, to where they were, state whether or not the yardmaster said to you that, if you went out there, you must go at your own risk? A. I think not. He said nothing of that kind as I understood."

This is substantially all of the testimony in relation to the permission that was given plaintiff to enter defendant's yards on that occasion. Viewed in the light most favorable to plaintiff, it establishes the fact that when he entered the yards of the defendant, and at the time he was injured, he was a bare licensee. He was not there as a passenger or servant, nor under any contractual relation with the defendant, but had been permitted to enter upon the premises for his own interest, convenience or gratification. In such a case the authorities substantially all say that the rule is well settled that an owner of premises owes to a licensee no duty as to the condition of such

premises, unless imposed by statute, save that he should not knowingly let him run upon a hidden peril, or wantonly or wilfully cause him harm; that the licensee enters upon the premises at his own risk, and enjoys the license subject to its concomitant perils. 29 Cyc. 451, and notes 69 and 70, citing a large number of authorities from many states, including the decision of this court in *Chesley v. Rocheford & Gould*, 4 Neb. (Unof.) 768. In that case we held: "Where one enters upon the premises of another with his consent, but without an invitation, and not in the discharge of any public or private duty, he is a bare licensee, and the occupier of the premises owes no duty to him as long as no wanton or wilful injury is inflicted upon him by the licensor or his servants." The writer presided as the trial judge in the trial of that case, and, following the well-established rule, directed a verdict in favor of the defendant, which this court affirmed. The same rule is announced in 3 Elliott, Railroads (2d ed.), sec. 1250, where reference is made to a long line of decisions in support of the text. In December, 1907, the supreme court of Illinois in considering this rule said: "If a mere licensee goes upon another's premises for purposes of his own, and not for any purpose connected with the owner's business, the owner's duty to guard him against injury is governed by the rules applicable to trespassers, and he can recover only for an injury knowingly and wilfully inflicted." *Pauckner v. Wakem*, 83 N. E. 202, (231 Ill. 276). In *Glaser v. Rothschild*, 106 Mo. App. 418, 80 S. W. 332, the same rule is announced, and *Chesley v. Rocheford & Gould*, *supra*, cited with approval.

Counsel for plaintiff place a good deal of reliance upon *Chicago, B. & Q. R. Co. v. Wymore*, 40 Neb. 645, and *Omaha & R. V. R. Co. v. Wright*, 47 Neb. 886, but those cases are clearly distinguishable from the case at bar. In the former case it appears that about 2 o'clock in the morning a special freight train, west-bound, failed to get onto a side-track at Mullen in time to get out of the way of an east-bound train, which resulted in a collision that

piled the two engines and a number of cars up in a heap upon the two tracks and upon the space between them. Wymore was a section foreman in the employ of the railroad company, and resided in a section house upon the right of way of the railroad, south of the tracks, west of the station, and almost due south of the point where the west-bound engine stood at the time of the collision. A young lady who had come to Mullen that day for the purpose of taking a passenger train which was due about half past 3 o'clock in the morning had gone to Wymore's house, and she and Wymore left the house for the depot about 2 o'clock. When the wreck was cleared away, their dead bodies were found beneath the wreck and between the side-track and the main track. A public roadway, accessible from Wymore's house, crossed both tracks between Wymore's house and the station, which was situated north of the main track. In the opinion it is said: "The inference is that Wymore and Miss Wilgus, on leaving the house, found the roadway blocked by the west-bound train on the side-track, and, in the effort to reach the station, crossed the side-track at a point almost north from Wymore's house, and were proceeding between the two tracks toward the depot when the wreck occurred. There was evidence tending to show that the tracks were at that point from 15 to 25 feet apart. * * * We can conceive a case where the right of way of the railroad is protected by fences, where ample means of ingress are offered the passenger by absolutely safe methods, and where the attempt of a person to approach a station along the right of way would be so hazardous, so difficult, or so unusual that a jury could hardly be justified in finding that the company in operating its trains should be required to exercise any precaution to avoid injuring such persons. On the other hand, there are many stations in this state where the station house stands upon the open prairie, where the means of approach are by roads which are nothing more than partly beaten paths over the prairie, where the most convenient and the generally used means of access is over

and along the company's tracks. In such a case the company has every reason to expect that persons having occasion to approach its station probably will be found near the station and along and upon its tracks, and a jury might reasonably find a company wanting in due care in the operation of its trains under such circumstances where such an inference, under the circumstances first mentioned, would be unreasonable." Under that state of facts we said in the second paragraph of the syllabus: "A railroad company does not discharge its whole duty by refraining from wantonly injuring a trespasser upon its tracks after observing his position. It is bound in all cases to exercise reasonable care to avoid injuring all persons who are known to be, or who may be reasonably expected to be, upon its right of way."

In the latter case above cited the action was to recover damages on account of cattle, belonging to plaintiff, killed and injured by a train of the railway company. The allegations of the petition were: "First, that a gate on one of the fences along the right of way was insufficient and negligently permitted to be out of repair, and that by reason of those facts the cattle got upon the right of way; second, that after they got upon the right of way their injury resulted from the careless operation of the train." The position taken by the defendant in that case was that the cattle were trespassers upon the right of way of the company. The evidence showed that there were about 340 cattle along the right of way; that, while there was a curve in the road near the point where the cattle were struck, there were no cuts, grades or other obstructions which would prevent a clear view of the track for a distance of half a mile. The accident occurred shortly after 7 o'clock on the morning of December 15. Some of the witnesses testified that it was a clear morning and quite light at that time; others, that it was misty and dark. The court submitted to the jury the question of the defendant's liability under instructions that, "if the engineer saw the cattle, or by the exercise of due care should have

Shulta v. Chicago, B. & Q. R. Co.

seen them, in time to stop the train and avoid the accident, the company was liable for his not doing so." On those facts we said: "It is the duty of an engineer in charge of a train to exercise such a lookout as is consistent with his other duties to ascertain the presence of obstructions on the track, and, if such a precaution would have revealed the presence of stock in time to have avoided their injury by the use of ordinary care, the railroad company is liable for injuries inflicted upon them, although they were not actually seen until too late to avoid striking them, and although they were not within the protection of the statute requiring tracks to be fenced." We do not see how this case has any application to the case at bar.

We fully recognize the rule laid down in the former of the two cases above referred to: "A railroad company does not discharge its whole duty by refraining from wantonly injuring a trespasser upon its tracks after observing his position. It is bound in all cases to exercise reasonable care to avoid injuring all persons who are known to be, or who may be reasonably expected to be, upon its right of way." But can such a rule be applied to the facts in the case at bar? We think not. The evidence shows that the train crew that was engaged in the weighing and switching of the cars which caused the injury to plaintiff had no knowledge, information or notice of any kind that plaintiff was in the car, or that there were any strangers in the yard. It is true the night yardmaster knew that plaintiff had gone down into the yard to see his cousin, who was on an emigrant car then in the yard; but we do not think it was any part of his duty to send word all through the yards to the various train crews there at work that he had given plaintiff a license to go into the yards on a private mission, and for them to be on the lookout to avoid injuring him. In other words, giving the most favorable construction to plaintiff's theory, before the company could be held liable under the facts in this case, plaintiff would have to show that the defendant's agents engaged in the switching and operating of the cars

which caused plaintiff's injury knew, or had reason to know, of his presence in the car. *Pettit v. Great Northern R. Co.*, 58 Minn. 120.

We deem it unnecessary to further pursue the citation or discussion of authorities, as a careful and painstaking investigation of our own has satisfied us that they are substantially all one way. Under this settled state of the law, defendant did not owe plaintiff any such duty as rendered it liable for the unfortunate injury which he received. The district court should have directed a verdict in favor of the defendant; and, for its error in refusing so to do, its judgment must be

REVERSED.

CORA M. DAVIS ET AL., APPELLEES, V. FRED F. BORLAND ET AL., APPELLANTS.

FILED JANUARY 23, 1909. No. 15,414.

1. Intoxicating Liquors: ACTION FOR DAMAGES: PLEADING: EVIDENCE.

In an action against the vendors of intoxicating liquors to recover damages suffered from the acts of an intoxicated person, it is sufficient, under the provisions of section 7168, Ann. St. 1907, to plead and prove that the defendants sold or gave intoxicating liquors to the intoxicated person, from whose act the damage arose, on the day or about the time the injuries to the plaintiff were received. In such cases the statute by its terms supplies allegations and proofs required in other actions for damages.

2. ———: ———: INSTRUCTIONS. In an action for loss of means of support caused by the death of a person, it is error for the court to instruct the jury that such loss began upon the death of the deceased person, and would continue as to one of the defendants "until such time as he would have lived had he been permitted to reach the end of his natural life, as indicated by the tables of expectancy, which have been introduced and received in evidence in the case," and especially is this true when there is testimony in the case tending to show a serious injury suffered by the deceased previous to any sale of liquors made by the defendants, and which would naturally tend to shorten his life or to cause his insanity.

Davis v. Borland.

APPEAL from the district court for Jefferson county :
WILLIAM H. KELLIGAR, JUDGE. *Reversed.*

Heasty & Barnes, for appellants.

A. G. Wolfenbarger and *W. J. Moss*, *contra.*

DUFFIE, C.

The plaintiff, for herself and as next friend of her two minor children, brought this action against the defendants Borland and Greve, and the sureties upon their several liquor license bonds, to recover for loss of means of support caused by the death by suicide of Llewellyn H. Davis, the husband and father of the plaintiffs. The petition, after alleging that the defendants Borland and Greve had been licensed to sell intoxicating liquors and had executed the bonds sued upon, proceeds to state: "That Davis immediately thereafter commenced to drink in their saloons, and that said defendants furnished him intoxicating liquors in sufficient quantities to produce his intoxication; that in consequence his mental condition became seriously impaired as a result of his continued debauchery until, on or about the 15th day of July, 1904, the said defendant saloon-keepers, and each and all of them, separately and severally, by themselves and respective bartenders, agents and servants at their respective places of business in the said city of Fairbury, sold, gave and furnished to said Llewellyn H. Davis intoxicating liquors and drinks in sufficient quantities to produce his intoxication, and did thereby cause and produce his intoxication, and while under the influence of the intoxicating liquors so sold and furnished to him by said defendants, and each of them, the said Llewellyn H. Davis became irresponsible, despondent, and deranged in mind, and was incapable and unable to properly care for, control or protect himself, and while in said despondent, irresponsible and deranged condition, and while so intoxi-

cated, he, the said Llewellyn H. Davis, took, and with his own hand administered to himself, a deadly poison, to wit, carbolic acid, from the effect of which he then and there came to his death."

A demurrer to this petition, upon the ground that it failed to state a cause of action against the defendants, was overruled by the trial court, and this is the first error assigned. It is urged with great earnestness that the petition fails to show any connection between the act of the defendants in furnishing the deceased with intoxicating liquors and his suicide. In other words, that it is not alleged that the taking of poison which resulted in his death was caused by the sale of intoxicating liquors by the defendants. That there may be no misunderstanding, we quote from the defendants' brief upon this point: "The mere fact that a man kills another while intoxicated fixes no liability on the saloon-keeper. Liability attaches only when the jury are satisfied that intoxication caused or contributed to cause the homicide. If Davis killed himself while intoxicated, there is no liability, unless the jury conclude that the drinking of intoxicating liquors caused or contributed to cause the suicide." There can be no doubt that as a legal proposition the above quotation from the brief of the defendants is a correct statement of the general rule of law, and that in ordinary cases it is well settled that a petition, in order to state a cause of action, should set forth every essential fact which the plaintiff must prove in order to entitle him to recover. Our legislature, however, has created an exception in this respect in cases brought against the vendor of intoxicating liquors for damages sustained in consequence of intoxication arising from the sale thereof. Section 7168, Ann. St. 1907, is in the following language: "On the trial of any suit under the provisions hereof, the cause or foundation of which shall be the acts done or injuries inflicted by a person under the influence of liquor, it shall only be necessary to sustain the action to prove that the defendant or defendants sold or gave liquor to the person so intoxi-

Davis v. Borland.

cated, or under the influence of liquor, whose acts or injuries are complained of, on that day or about that time when said acts were committed or said injuries received; and in an action for damages brought by a married woman or other person whose support legally devolves upon a person disqualified by intemperance from earning the same, it shall only be necessary to prove that the defendant has given or sold intoxicating drinks to such person during the period of such disqualification." This section of itself supplies allegations and proof in respect to matters that are essential in the ordinary action. When damage has been suffered at the hands of an intoxicated person, the statute, in an action brought against the vendor to recover for such damages, raises a presumption in favor of the plaintiff that the sale which caused the intoxication, or which contributed thereto, was the cause of the injury; and, as stated in *Nowotny v. Blair*, 32 Neb. 175: "It was sufficient to plead and prove that the defendant sold or gave intoxicating liquor to the intoxicated person 'whose acts or injuries by him inflicted are complained of, on that day, or about the time when the acts were committed, or the injuries to the plaintiff were received.'" We conclude, therefore, that, under the statute and our former opinions, the petition states a cause of action, and that the demurrer thereto was properly overruled.

Error is further assigned in giving instructions 3 and 10 covering the measure of damages. In the third instruction the jury are told "that the loss of the means of support to said wife and children became permanent by the death of the husband and father, and the period covered by such loss began at the time of the death of the husband and father, and continued, as to the minor children, until they became of age, and as to the wife, from the death of the husband until such time as he would have lived had he been permitted to reach the end of his natural life, as indicated by the tables of expectancy, which have been introduced and received in evidence in

the case." The tenth instruction embodied the same principle, except that the jury were told that in making their calculation they were to use the Carlisle table of expectancy of life, which has been introduced in evidence on the trial. The objection to these instructions is based upon the fact that the jury were restricted to the tables of expectancy of life in determining the probable duration of Davis' life in ascertaining the damages sustained. There are numerous cases to the effect that tables of expectancy of life, while admissible for the purpose of showing the probable duration of the life of a deceased party, are not controlling in their effect as evidence, but that many other facts should be considered by the jury. The proper rule is stated in *City of Friend v. Ingersoll*, 39 Neb. 717. It is there said: "The Carlisle table of expectancy of life is competent and admissible in evidence as bearing upon and tending to prove the expectancy of life, but not conclusive of the question, and is to be received and considered by the jury as any other evidence, and subject to the same rules as to its weight and sufficiency as other testimony; and its statement as to expected duration of life may be varied, strengthened, weakened, or entirely destroyed by other competent evidence on the question of the expected continuance of life of the injured party, such as testimony pertaining to the health of the party at the time of the injury upon which the action is based."

It is established by the evidence that about ten years previous to the death of Davis, he met with an accident, which resulted in the fracture of his skull at the base of the brain, producing his insanity, on account of which he was confined for a time in an insane hospital of the state. There was testimony, also, to the effect that a recurrence of his insanity might take place at any time without any new or intervening cause. In this condition of the case an instruction which in effect told the jury that they were to be guided by the Carlisle table of expectancy of his life and his earning capacity was erro-

Davis v. Borland.

neous and misleading. The jury returned a verdict for \$1,750, and it is insisted that the instruction, if erroneous, was, considering the amount of the verdict, without prejudice to the defendants, the claim being made that the evidence established that the deceased contributed about \$1,000 a year to the support of the plaintiffs. The partner of the deceased testified that the gross receipts from their business for the seven months previous to the death of Davis was from \$175 to \$200 a month, and their expenses from \$50 to \$75 a month. As said in *Greenwood v. King*, 82 Neb. 17: The damages "should have been ascertained by the jury under proper instructions. To hold that the errors complained of were without prejudice in this case would be equivalent to saying that the jurors were infallible, and that, too, * * * under instructions which their oaths required them to follow, and which directed that the damages be measured by a broad and erroneous rule." We must presume that the jury followed the instructions of the court, and that they agreed on the amount of support which Davis contributed to his family each year, and then multiplied that by the years of his expectancy.

For the error of the court in directing an erroneous measure of damages, we recommend a reversal of the judgment.

EPPELSON and GOOD, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

REVERSED.

IN RE ESTATE OF F. W. BUERSTETTA.

GRANT BUERSTETTA, EXECUTOR, APPELLEE, v. HENRY
BUERSTETTA ET AL., APPELLANTS.

FILED JANUARY 23, 1909. No. 15,353.

1. **Appeal: QUESTIONS CONSIDERED.** Where a judgment of the lower court and the disposition of the case in this court are not prejudicial to the interests of an appellant, this court will not consider an assignment of error that the lower court had no jurisdiction over the person of the appellant.
2. **County Court: JURISDICTION: TITLE TO REAL ESTATE.** The provision of section 16, art. VI of the constitution barring the county court from jurisdiction of actions in which title to real estate is sought to be recovered or may be drawn in question does not apply to cases wherein the title to realty is involved as an incident to an important litigable question of which that court has exclusive original jurisdiction.
3. **Wills: CONSTRUCTION.** In the construction of a will, the court will presume that the testator intended the will as a consistent whole, and will consider it in its entirety, its several parts with reference to each other, to ascertain, if possible, the meaning which the testator attached to any part thereof.
4. **Executor as Trustee: TITLE TO REAL ESTATE.** An executor, as a trustee, cannot hold the legal title to land devised for the use of the beneficiary, unless the testator has by his will expressly or impliedly created in him a trust estate other and different from that of executor, or unless a trust is made necessary that the intentions of the testator may be executed.

APPEAL from the district court for Johnson county:
WILLIAM H. KELLIGAR, JUDGE. *Reversed.*

E. B. Quackenbush, for appellants.

Hugh La Master and Burkett, Wilson & Brown, contra.

EPPERSON, C.

This action was instituted in the county court of Johnson county by the executor of the last will of F. W. Buerstetta, deceased, for the purpose of procuring judicial con-

struction of the will in order that he might carry out the provisions thereof. The will was admitted to probate February 27, 1905. Provision was made in paragraph 1 for the payment of debts, funeral expenses, etc. By the second paragraph testator gave to his wife, Belle Buerstetta, the use of certain valuable real estate not necessary to describe here. This devise was not absolute, but the wife's right to enjoy the land was limited, and fixed as follows: "During the term of her natural life, and all the rents, profits and benefits to be derived therefrom. In case the rents, profits and benefits of this property is more than is needed for her support, it shall be loaned or invested in real estate as seen fit by my executor."

Other paragraphs are as follows: "Third. After the death of my said wife Belle Buerstetta the property heretofore mentioned shall be divided in the proportion which shall be mentioned hereafter in this will, among my brothers and sisters.

"Fourth. I give to my beloved Mother Sarah C. Berry, \$50 in cash.

"Fifth. It is my desire that the property mentioned as the share of my beloved brothers John Buerstetta, Henry Buerstetta and William Buerstetta and my beloved sister Matilda Tingle is to be invested in real estate, chosen by them, to be theirs as long as they shall live without the right to incumber or sell the same, and all the rents profits and benefits of the same to be theirs, taxes to be paid by them and at their death it shall be divided equally among their living children.

"Sixth. To the three children of my beloved brother George (deceased) I give \$500 each to be retained by my executor until they become 21 years of age and shall be loaned on real estate and the income shall first pay expenses and in case there is accumulation it shall go to the children herein mentioned.

"Seventh. To my beloved Brother John Buerstetta I give \$2,000 in cash."

And in paragraphs 8 to 13, inclusive, are bequests to

each of his several brothers and sisters, among whom are Henry, William and Matilda, each bequest being identical with paragraph 7, except as to the name of the beneficiary. Paragraph 14 is as follows: "Fourteenth. To my beloved half-sister Jessie Hahn I give \$250, this to be the full amount of her share and all she shall have of my estate."

Paragraph 15 makes a gift to a church, and by paragraph 16, a brother, Grant Buerstetta, is named executor. Following this is the date of the will, December 31, 1904, and the signature of the testator. But following the signature are other testamentary provisions in consecutively numbered paragraphs. Number 17 provided for the sale by the executor of all the real estate, except such as had been mentioned above.

Other sections are as follows: "Twentieth. After all my affairs are settled and the sums paid over or invested as has been mentioned heretofore in this will whatever is left shall be divided among my brothers and sisters in the same proportion as has been mentioned heretofore in this will and shall be invested or paid over as has been stated heretofore except to the three children of my beloved brother George and the part heretofore mentioned in this will as their share to be the full amount of their share and all they shall have of my estate.

"Twenty-First. I have made this will in view of a contract existing between myself F. W. Buerstetta and my wife Belle Buerstetta that at her death she agrees that the residence property owned by her in Tecumseh, Johnson Co., Nebraska, situated one block east of public square on Clay st. go to my brothers and sisters and be disposed of in the same proportion as has been provided for in this will and she hereby acknowledges this contract by signing her name (Signed) Belle Buerstetta."

Other paragraphs provide for intended recipients or for the execution of obligations, none of which are here involved. The will was again signed and attested.

The executor appointed by the will qualified and entered upon his duties. He has sold all the land, except that mentioned in the second paragraph, and now has on hand about \$27,000 after paying all the legacies, except the bequests to the brothers and sister.

The adult defendants contend that the county court did not acquire jurisdiction over their persons; but by their general appearance in that court they waived whatever defects may have existed in the service of process.

Fred Buerstetta, a nephew of the testator, is here urging that the county court had no jurisdiction over him. He was a minor at the time of the trial in the lower court. Whether he is now or not the record fails to disclose, but as he has appealed from the judgment of the district court, we presume he has reached his majority. We ignore his appeal. The judgment of the lower court was favorable to his financial interests, although adverse to his contentions. The judgment we recommend does not prejudice him. He is now, and in the lower court his guardian *ad litem* was, contending that he had no interest in a \$2,000 gift, which was made for the benefit of Henry Buerstetta during his life, with remainder to his (Henry's) children, of whom Fred is one. If he does not want his uncle's gift, he can dispose of it now that he has reached age, without license from the court.

It is also contended that the county court had no jurisdiction of the subject matter of this case. By section 16, art. VI of the constitution, county courts are given original jurisdiction in all matters of probate, settlement of estates of deceased persons, etc. The county court is thereby invested with such powers; and it has been held that the county court has exclusive original jurisdiction in all matters of probate, and in actions for the construction of wills upon the application of the administrator, when such construction is necessary for the purpose of enabling him to carry into effect the provisions of the will. *Reischick v. Rieger*, 68 Neb. 348; *Youngson v. Bond*, 69 Neb. 356, and cases cited. This general rule

is not assailed by the defendants, but they contend that a question of title is here presented, which defeats the jurisdiction of the county court, by reason of other provisions of said section of the constitution, which deny to the county court jurisdiction in cases involving the title to real estate. It is conceded that the authority of the county court in actions to consider wills is confined to the purpose of giving necessary and proper directions to an executor so that he may effectually execute the intentions of the testator as expressed in the will. In *Youngson v. Bond*, *supra*, a distinction is made between actions brought by an executor for a construction of a will and one by a trustee after settlement of the estate to obtain a construction of the provisions of the will relating to the trust. In the latter case a court of general equity powers should have jurisdiction. But this action is brought before distribution. The executor has in his hands \$27,000, a part of which, on account of an ambiguous provision in the will, he does not know how to distribute, and he calls for judicial guidance. There is no land the title to which is in controversy. The question involved is what disposition shall be made of certain sums of money, and this only to the extent of determining whether this money shall be delivered in specie to the beneficiary or invested in real estate for his benefit. In other words the intention of the testator is to be ascertained, and the language used by the testator in expressing his intention is the matter in dispute. Incident to the main inquiry, the question of the vesting of the legal title to land which is to be purchased is concerned, but the constitutional inhibition barring the county court from jurisdiction in cases where the title to real estate is involved does not apply to those cases wherein the title is determined as an incident to an important litigable question of which that court has exclusive original jurisdiction. If the title to real estate is the principal thing to be determined, then, necessarily, the title is in issue, but, if that question arises incidentally, it is not considered in issue so as to

bar the court from entertaining the action. As was said by Mr. Commissioner POUND in *Youngson v. Bond*, *supra*, referring to the constitutional limitation upon the jurisdiction of the county court: "The evident meaning is that the county court shall have no jurisdiction of actions to recover real property or wherein the present title to real property is directly or substantially involved. But the provision does not mean that the county court is to be without jurisdiction where a question of title arises incidentally or collaterally or where the present title is not involved."

The questions to be determined are whether or not the testator intended that \$2,000 was to be paid in cash to each of the three brothers, John, Henry and William, and the sister, Matilda, or that that sum was to be invested in real estate for them during life with remainder to their children. If invested, should the title be taken in the name of the executor as trustee, or in the names, respectively, of the beneficiaries? In what lands are these funds to be invested? Who is to select the lands? If the beneficiaries for life, then can the court place any restraint whatever upon their selection? Who takes the remainder, the living children of the three brothers and sister named *per stirpes* or *per capita*? It is apparent, and in fact there is no serious contention but that, if the funds are to be invested in land, at the death of each of the brothers and sister his or her children then living should take the property of which their parent was the life beneficiary.

The lower court found and decreed that the \$2,000 given to each of the brothers and sister above named should be invested in land by the executor as trustee, taking title in his name, for the use and benefit of the beneficiaries; that the trustee should manage such real estate, pay taxes, insurance, etc., pay the net proceeds to the beneficiaries, and make annual reports of all moneys collected and expended. By this decree a continuing trust was created. Henry Buerstetta and his children have appealed. Other relief was granted by the lower court, ap-

proving the conduct of the executor in disposing of real estate, which is not assailed by this appeal.

A few general observations here noted are of value in the interpretation of this instrument: The testator intended, although not expressly saying it, that his brothers and sister of the whole blood should be the beneficiaries of equal shares of his estate. The will may, for the purpose of analysis, be considered as consisting of three parts or divisions: First, specific real estate is disposed of in paragraphs 2 and 3; second, a number of specific bequests or devises; third, the residuary clause. It is assumed that the testator intended that his will should be a consistent whole, and we must consider it in its entirety, its several parts with reference to each other, to ascertain, if possible, the meaning which the testator himself attached to any part thereof. The function of the court is to interpret, and not to construct. The cardinal rule requires the court to ascertain the expressed intentions of the testator. We have not found it necessary to examine the extraneous evidence introduced upon trial for the purpose of ascertaining the testator's intentions.

The first important question is to determine what property was referred to in the fifth paragraph as "the property mentioned as the share of my beloved brothers John, Henry and William and my beloved sister Matilda." Defendants contend that it refers to the real estate mentioned in the third paragraph, in which all the brothers and sisters were given the remainder. We cannot accept this construction. The second and third paragraphs effectively dispose of the property therein mentioned, and, beginning with the fourth paragraph, by a bequest of \$50 in cash to his mother, testator undertook to dispose of other property. It does not seem probable that, after disposing of specific real estate in unequivocal terms, and after beginning the disposition of other property by making specific bequests, the paragraphs referred to could have been intended as a limitation upon the devise made in the former division of the will. Nor does it seem pos-

sible that it could refer to the residue disposed of by the third division. The fifth paragraph did not specifically mention any property, but it referred to whatever property the testator intended to identify by the phrase "property mentioned as the share." The only property mentioned in the second division of the will as the shares of these beneficiaries are the items of \$2,000 to each. Although the "property mentioned" in the fifth paragraph cannot refer to the residue of the estate disposed of in the third division of the will, yet the language used in the residuary clause is of evidential value in ascertaining the intentions of the testator as expressed in the fifth paragraph. This clause provides for the disposition of the residue after "the sums paid over or invested as has been mentioned heretofore." This "*invested*" may possibly have referred to the bequest to nephews in the sixth paragraph; but, in view of what follows, we think not, for, continuing the residuary clause provides that the residue shall "*be invested or paid over*" to the brothers and sisters as stated heretofore. This indicates that testator contemplated that an investment had been previously arranged for some of his brothers and sisters. And in this regard it is improbable that he referred to the remainder of the specific real estate in the second and third paragraphs, as the enjoyment of that remainder would not probably begin until long after the bequests mentioned in the will had been paid over and the estate settled. Although the \$2,000 was mentioned as a cash bequest to each of the three brothers and one sister, it is very apparent, from the whole instrument that testator intended that it should not be paid to them, but should be invested for each of them "*in real estate chosen by them.*" Their share of the residue is likewise to be invested.

The executor is entitled to judicial guidance in making this investment. Should he purchase in his own name or in the names of the beneficiaries? In no case can the executor hold the legal title as a trustee unless the will itself has, either expressly or impliedly, created in him a

trust estate other and different from that of executor, or unless the trust is made necessary that the intention of the testator may be enforced. It is the executor's contention that the language used in the will was sufficient to create such a trust. It does appear that the testator considered that the executor would indefinitely have control of some part of the estate. For instance, the second paragraph provides that the surplus accumulated from the rents derived from the land mentioned therein shall be loaned or invested by the executor, and paragraph 6 provides that he shall hold the bequest to the children of his deceased brother George until they arrive at their majority. But there are no similar expressions made with reference to the \$2,000 bequest in controversy, and the expressed intentions relative to other funds does not imply a similar intention as to these particular gifts. And, again, such a construction would be absolutely contrary to the expressed will of the testator, for in the fifth paragraph the land procured by these investments is "to be theirs (the brothers and sister named) as long as they shall live without the right to incumber or sell the same and all the rents profits and benefits of the same to be theirs, taxes to be paid by them and at their death it shall be divided equally among their living children." It is apparent, therefore, from this expression that the title is not to be held in trust but that the right to the enjoyment of the estate is to be circumscribed only by the limitations expressed in the will. The executor argues that, if the title is vested in the beneficiaries without reservations, they might permit it to be incumbered by an accumulation of taxes, or otherwise. This may be so, but such a condition will not permit the creation of a trust. At most this argument only shows that testator did not use as good judgment as would the executor or the court, but his judgment, although unwise, must be respected. The court should have advised the executor to invest for Henry Buerstetta, John Buerstetta, William Buerstetta and Matilda Tingle the said \$2,000 devised to them, respect-

Acken v. Tinglehoff.

ively, as follows: In land in Nebraska to be selected by said devisee so that a life estate only, and without the power to incumber or alienate the same, should vest in the devisee, remainder in equal shares to his children him surviving.

We therefore recommend that the judgment of the district court be reversed and the cause remanded for further proceedings.

DUFFIE and GOOD, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and this cause remanded for further proceedings.

REVERSED.

LIZZIE ACKEN, APPELLEE, v. FRED TINGLEHOFF ET AL.,
APPELLANTS.

FILED JANUARY 23, 1909. No. 15,432.

1. **Intoxicating Liquors: ACTION FOR DAMAGES: EVIDENCE.** In an action by a wife against licensed liquor dealers to recover damages for nonsupport by her husband, who was made an habitual drunkard either wholly or partially through the defendants' traffic, it is competent to introduce the Carlisle table of mortality as evidence of the husband's expectancy of life, when a sufficient foundation therefor is laid by evidence tending to show that the husband's habitual inebriety has premanently impaired his earning capacity.
2. ———: ———: ———. In such action, the plaintiff may prove that necessaries were furnished the family by the county and by charitable institutions; and, also, may show the suffering to which the family was subjected through the husband's neglect caused by his drunkenness.
3. ———: ———. Liquors sold by the defendant need not be the sole cause of an injury to permit a recovery.
4. **Appeal: AMOUNT OF RECOVERY.** Upon conflicting evidence as to the amount of damages, there being sufficient evidence to sustain the verdict, a judgment will not be set aside as excessive.

5. **Intoxicating Liquors: ACTION FOR DAMAGES: INSTRUCTIONS.** An instruction stating: "If you further find from the evidence that, prior to the wrongs complained of in plaintiff's petition, plaintiff's husband was a strong robust man, but that after said wrongs plaintiff's husband was permanently impaired in his earning capacity, then in determining the damages to be allowed plaintiff you may take into consideration the tables of expectancy which have been introduced in evidence" is not erroneous because it permitted the jury to consider permanent impairment from whatever cause, when the uncontradicted evidence showed that the permanent impairment was caused solely by habitual drunkenness.

APPEAL from the district court for Lancaster county:
LINCOLN FROST, JUDGE. *Affirmed.*

Strode & Strode, for appellants.

Morning & Ledwith, contra.

EPPERSON, C.

This action was brought by plaintiff for herself and in behalf of her seven minor children against the principal defendants who are licensed liquor dealers, and the surety upon their bonds. Plaintiff alleged substantially that the principal defendants, during the years 1901, 1902, 1903 and 1904, sold intoxicating liquors to her husband, thereby causing him to become an habitual drunkard, permanently injured in health and earning capacity, whereby plaintiff and her children have been deprived of the husband's support, upon which they were dependent. Defendants appeal from a judgment for \$3,750.

Plaintiff recovered in part for damages resulting from the permanent disability of her husband. She introduced in evidence the Carlisle table of expectancy of life. Defendants argue that this was inadmissible because there was no evidence of a permanent disability. No witness testified that plaintiff's husband was permanently incapacitated from contributing to the support of his family. It is improbable that any person could have special knowl-

edge which would permit him to testify to a certainty as to whether or not an habitual drunkard would reform or be restored to health, regain his natural faculties, and perform the duty of supporting his family. Such testimony would not strengthen the plaintiff's case. It is for the jury to determine from the evidence of the husband's habits and condition whether his failure to support the family will be permanent. The Carlisle table may be given in evidence after the introduction of creditable evidence tending to show the permanent character of an injury. *Howard v. McCabe*, 79 Neb. 42. Evidence of expectancy is usually introduced in damage cases for personal injuries or death. The case at bar is not, strictly speaking, a personal injury case. It is permitted by the statute, and did not exist at common law. It is, however, very similar to a personal injury case in so far, at least, as the amount of recovery is measured by the same rules. There can be no doubt but that, had the death of a person resulted from the sale of intoxicating liquors, the Carlisle table would be admissible as evidence of expectancy. Every reason for permitting such evidence in personal injury cases exists in the case at bar. Of course, in any such case the foundation for this evidence must be laid. But defendants argue that the husband may reform, and quote from *Rouse v. Melsheimer*, 82 Mich. 172, as follows: "The law does not presume that a drunkard cannot reform, for the world is full of instances of such reformation." The above statement was not made with reference to the life expectancy of the drunkard, and, although the statement is true, it cannot be considered as a judicial precedent to be followed here. In *Jones v. Bates*, 26 Neb. 693, MAXWELL, J., said with reference to a particular drunkard: "Had they (the liquor dealers) ceased supplying him with intoxicating drink, it is probable that he would soon have regained his usual vigor." In *Stahnka v. Kreitle*, 66 Neb. 829, this court disagreed with Judge MAXWELL's dictum above quoted. While it is true that drunkards may reform, yet the probability of any par-

Acken v. Tinglehoff.

ticular one doing so is a matter for argument, and not for presumption. In the case at bar the evidence shows that the plaintiff's husband at the time of the trial and for a few years preceding was in a deplorable condition of habitual, almost continuous, miserable drunkenness, broken in health by reason thereof, an old man in appearance at the age of 44 years, and, when frequenting defendants' saloons, even late at night, was almost entirely indifferent to the entreaties, not only of his wife, but of his aged mother, and his little boy, who, notwithstanding the degradation to which their husband, son and father had fallen, sought to protect him against the impending danger. The whole record indicates that he has no desire to return to virtuous manhood or good citizenship. The evidence was sufficient to permit the jury to find that his inability was permanent. *Jessen v. Wilhite*, 74 Neb. 608.

The plaintiff over objection was permitted to prove the following facts: That one of her little girls, two years old, did not get any milk to drink; that the county had paid the burial expenses of a deceased child; that a charity organization, the county and the salvation army had at times provided some coal for the use of the family, and provided other necessities; that at times the family did not have sufficient coal to keep them warm, and that the children would go to bed in the daytime to keep warm. Defendants argue that such evidence was calculated to play on the passions and prejudice of the jury. We consider such evidence admissible. It was necessary for the plaintiff to prove that the family was not supported by her husband, and it was perfectly proper to prove that the subsistence of the family was obtained from other sources, and also to prove the physical suffering occasioned by want and neglect.

The court instructed the jury as follows: "If you further find from the evidence that, prior to the wrongs complained of in plaintiff's petition, plaintiff's husband was a strong robust man, but that after said wrongs plaintiff's husband was permanently impaired in his earning ca-

Acken v. Tinglehoff.

capacity, then in determining the damages to be allowed plaintiff you may take into consideration the tables of expectancy which have been introduced in evidence." It is argued that this was error because not limited to permanent injuries to the husband's earning capacity caused by the use of intoxicating liquors furnished by the defendants, but permitted the jury to consider permanent impairment caused otherwise. There was undisputed evidence that the husband's disability was caused by drunkenness, and that otherwise he was a healthy man. The instruction was necessary.

During the first year of the time when the wrongs complained of were done, one of the principal defendants was not engaged in the liquor business and defendants insist that the court should have given an instruction directing the jury that they should not find against this defendant for damages which resulted from the sale of intoxicating liquors to plaintiff's husband prior to the time that he sold or furnished him intoxicating liquors. No such instruction was asked by any defendant. All the principal defendants joined in a motion for a new trial, whereby the defendant entitled to such an instruction waived this alleged error. Defendants requested a certain instruction not necessary to quote here. We have examined it, and find it substantially the same as No. 3, given by the court on his own motion.

It is insisted that the judgment is so excessive as to indicate that it was the result of passion and prejudice. Under this assignment, the defendants also point out certain evidence tending to show that the plaintiff's husband was addicted to the excessive use of intoxicating liquors at the time he was married in 1893 and thereafter, but prior to the time of the defendants' wrongs complained of. The evidence on this point is conflicting. The mere fact that the plaintiff's husband had used liquor excessively prior to the time that defendants sold to him is not sufficient to defeat the plaintiff's action. We are cited to *Stahnka v. Kreitle, supra*, in support of defendants' con-

Acken v. Tinglehoff.

tention that they are not liable for damages resulting from a like traffic before they engaged in the business. This proposition is sound but it cannot control this case, because the plaintiff does not seek to recover for her non-support prior to the time the defendants engaged in business. By considering the evidence in the light most favorable to the defendants, the fact still remains and stands out boldly that the wrongful conduct of the defendants contributed to the condition of the plaintiff's husband as alleged in the petition and proved at the trial. This being the situation, the defendants are liable. It has been held that the liquors furnished by a defendant need not be the sole cause of an alleged injury in order to permit an aggrieved party to recover. *Wiese v. Gerndorf*, 75 Neb. 826; *Gorey v. Kelly*, 64 Neb. 605; *Wardell v. McConnell*, 23 Neb. 152; *Chmelir v. Sawyer*, 42 Neb. 362. Although conflicting, the evidence was sufficient to justify a finding that prior to the year 1901 the husband supported his family; that he provided a suitable house for their occupancy; that it was fairly well furnished, and the family supplied with necessary provisions; that he was capable of earning and did earn from \$1,000 to \$1,500 a year by which the necessary family supplies were furnished, and that at the time the plaintiff's husband began to frequent the defendants' saloons; that he was a strong man in good health; that thereafter he expended nearly all his earnings for liquor with defendants, and became substantially worthless to his family from a financial standpoint. A verdict for the amount returned was not excessive.

The record being without error, we recommend that the judgment of the court below be affirmed.

DUFFIE, GOOD and CALKINS, CC., concur.

By the Court: For the reasons given in the foregoing opinion the judgment of the district court is

AFFIRMED.

JOHN O. YEISER, APPELLANT, v. FRANK A. BROADWELL ET
AL., APPELLEES.

FILED JANUARY 23, 1909. No. 15,739.

1. **Attachment: PRIORITIES.** A written assignment of a sum of money in the custody of an agent, intended to convey the title thereof to the assignee, and made in definite terms, without the reservation of control in the assignor, is sufficient to give the assignee priority over a creditor attaching such funds in the hands of the agent subsequent to the date of the assignment.
2. **Fraudulent Conveyances: PRESUMPTIONS.** Fraud is not presumed from the mere fact that an insolvent debtor assigns property or pays money to his attorney for services rendered or to be rendered in the future.

APPEAL from the district court for Douglas county:
ALEXANDER C. TROUP, JUDGE. *Reversed.*

John O. Yeiser, pro se.

Byron G. Burbank and Lysle I. Abbott, contra.

EPPERSON, C.

Upon a former appeal to this court the plaintiff obtained the reversal of an adverse judgment because he had been refused a jury trial. The cause was remanded to the lower court, whereupon he waived a jury and again suffered defeat. One of the appellees intervened in the court below, and prayed that he might be permitted to go hence without day. Other than the above there is nothing in this case characterizing it as a comedy. It has not even the rhythm of melodrama. The subject matter is apparently the last crumb of the Nebraska estate of Adolphus Frederick and Phoebe Rebecca Elizabeth Elwina Linton, which has been consumed by their creditors.

Prior to December, 1902, W. K. Potter, receiver of the Omaha Loan & Trust Company, had collected \$1,830 of rent money belonging to the Lintons. In December the appellee Cathers garnisheed this fund in the hands of the

receiver, thereby attempting to apply it to the payment of a judgment against the Lintons. Potter then brought the money into court and deposited the same with the clerk, Broadwell, one of the parties hereto, who has since had the actual custody thereof. Subsequently, however, it was determined that the judgment upon which the proceeding was founded had been paid. *Linton v. Cathers*, 4 Neb. (Unof.) 641. Cathers then by motion sought to subject the fund to the payment of another judgment which he obtained against the Lintons January 17, 1903. Yeiser intervened. These proceedings were dismissed February 23, 1905; it being held that the funds were not *in custodia legis*. Immediately Cathers garnisheed both Potter and Broadwell. A few days later this action was instituted; plaintiff claiming the fund in controversy by assignment from the Lintons. By agreement the garnisheed defendants were discharged as such, and were permitted to answer the plaintiff's petition in this action wherein Cathers and another claiming under him had intervened. In May, 1902, the Lintons employed the plaintiff herein, an attorney at law, to take charge of all litigation in which they were involved. There was an understanding between them, but not reduced to writing, in which it was agreed that the plaintiff should receive the rents from all the property in Nebraska belonging to the Lintons. On May 20, 1902, at the request of plaintiff, the Lintons sent to Potter a telegram as follows: "Pay to John O. Yeiser any money in your hands due the undersigned." By errors in transmission it was addressed to "W. K. Ralter" instead of "W. K. Potter," and signed "A. S. Linton" and "P. R. E. E. Linton" instead of "A. F. Linton" and "P. R. E. E. Linton," notwithstanding which it reached Mr. Potter. On April 20, 1903, the Lintons directed Broadwell, the clerk of the court, by writing to pay the plaintiff Yeiser "any funds in your hands up to date which may be or has been found by the court to be due either severally or jointly to the undersigned." In January, 1904, the Lintons executed an instrument, as-

signing the rent due or to become due upon any real estate in Nebraska owned by them to the plaintiff, but said assignment was made subject to revocation at any time without notice. On August 29, 1904, the Lintons executed an assignment, the body of which is as follows: "For value received we assign all money due to us for rents from the Linton estate, Omaha, Nebraska, up to date, to John O. Yeiser."

The sufficiency of these assignments to convey title is the real question for determination. It is argued by the interveners that plaintiff's contract with the Lintons for the rents and profits of their estate is within the statute of frauds; the same not being in writing. Although the original contract, being for any and all rents which might accrue in the future, may have been within the statute of frauds, yet the plaintiff's right to the funds in controversy would not thereby be defeated if he subsequently procured a sufficient assignment thereof. When Potter collected the funds in controversy, they belonged to the Lintons and were wholly subject to their control. Potter, although receiver of the Omaha Loan & Trust Company, in his relations with the Lintons was but a collection agent, or, at most, the custodian of their funds. By the direct request of the plaintiff herein, the Lintons sent to Potter a telegram directing him to pay the money in his hands to Yeiser. This was a sufficient assignment, and was binding upon the Lintons. Had Potter complied with its terms and paid the amount then in his hands to Yeiser, the Lintons would have been irrevocably bound thereby. It is true that, on account of the errors in transmission Potter was justified in withholding the fund until the telegram could be authenticated. But, as the telegram was genuine, it was sufficient to vest title to the moneys then in Potter's hands in the plaintiff. In a former case between some of the parties hereto the telegram was not proved, and the plaintiff herein was not permitted to recover. *Yeiser v. Cathers*, 5 Neb. (Unof.) 204. But that case is not *res adjudicata*, as appellees contend.

The judgment there was that the garnishee should pay the fund into court to abide its future orders. Nothing further was determined, except that the evidence there did not establish the authenticity of the telegram. Be that as it may, subsequently executed written assignments were sufficient to cure any defects therein. The assignment of January, 1904, was without vigor, and we do not consider that the plaintiff obtained any rights thereunder. But all the other assignments were made in writing, and at times prior to the legal impounding of the fund by the intervenor Cathers. With the exception of the one assignment of January, 1904, the assignments made by the Lintons of the funds in controversy were definite and without reservation. In form they were similar to instruments usually made for the purpose of assigning funds. They were intended to pass title from the assignor to the assignee. They are, for these reasons, distinguishable from the attempted assignments construed in the cases cited by the appellees (*Nebraska Moline Plow Co. v. Fuehring*, 60 Neb. 316; *Phillips v. Hogue*, 63 Neb. 192), and cases in other states construing assignments in which the power to control was reserved in the assignor. For more than two years the fund was improperly impounded, during all of which time it has or should have been subject to the control and disposition of the Lintons or of their assignee, the plaintiff herein. At the time the garnishee summons upon which Cathers relies was served, the title to the fund had vested in plaintiff under his assignments, and his right thereto is superior to that of the interveners, unless, as contended by the latter, the assignments were made in fraud of the Lintons' creditors.

The Lintons were insolvent in May, 1902, and have continued so until the present time. It seems that they had no property except the rents and profits derived annually from certain real estate. These rents they attempted to assign to the plaintiff Yeiser, some of which,

including the fund here in controversy, had been collected at the time of the assignments. Faithful to his employment, the plaintiff took charge of their litigation and in a great measure was successful. There is no contention that his charges were exorbitant. The unpaid balance thereof exceeded the amount here in controversy. There is no evidence of actual fraud on the part of either the Lintons or the plaintiff herein. Fraud is not presumed from the mere fact that an insolvent debtor assigns property or pays money to his attorney for services rendered or to be rendered in the future. To hold that such is the case would be to say that an insolvent has no legal right to compensate an attorney to assist him in litigation. It appears that the Lintons had need of the professional services of an attorney at law. They were assailed by creditors, one of whom, at least, was attempting to collect the same debt twice, others were asserting demands subsequently defeated. We know of no law which will bar even an insolvent litigant from contesting unjust suits brought against him. It is true that transfers of property to an attorney by an insolvent client are scrutinized very closely by the court, and if the alleged consideration is disproportionate to the services rendered or if the attorney's charges are exorbitant, such transfers will be set aside. But where the transfer is made for services rendered or to be rendered in litigation, conducted in good faith by the attorney and the client, and where the charges made by the attorney are fair and just, such transfers are upheld. This question, we think, was ably discussed and properly disposed of in *Farmers & Merchants Nat. Bank v. Mosher*, 63 Neb. 130, and the principles underlying the conclusion which we have reached need not again be set forth here at greater length.

At a former trial the plaintiff herein testified that the rents in controversy were assigned to him by the Lintons for the benefit of their children. Had they been assigned solely for the benefit of the junior Lintons, much doubt would exist as to the legality of the assignment, but from

Fee v. Chicago, B. & Q. R. Co.

the whole case it appears that the plaintiff herein was employed by the Lintons, not only to protect the interests of their children, but their own. This evidence is insufficient to brand the transaction as fraudulent. In *Farmers & Merchants Nat. Bank, v. Mosher, supra*, the contract of employment in controversy was made in part on behalf of the assignor's wife.

The judgment of the lower court on the evidence of this case should have been for a dismissal of the petition of the interveners and for the payment of the fund in controversy to the plaintiff.

We recommend that the judgment of the lower court be reversed and this cause remanded for further proceedings.

DUFFIE and GOOD, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the lower court is reversed and this cause remanded for further proceedings.

REVERSED.

FAWCETT, J., not sitting.

FRANK F. FEE, APPELLEE, v. CHICAGO, BURLINGTON &
QUINCY RAILWAY COMPANY, APPELLANT.

FILED JANUARY 23, 1909. No. 15,399.

1. Railroads: INJURY TO ANIMALS: INSTRUCTIONS: HARMLESS ERROR.

In an action against a railway company for damages for killing horses on its track at a point where the law requires its right of way to be fenced, an instruction which permits plaintiff to recover by proving the fence or gates insufficient to prevent the horses from going upon the track, and that the horses were killed by defendant's train on its track, is not prejudicial, when the undisputed evidence shows that the horses went upon the railway track at the defective or insufficient gate.

2. Trial: INSTRUCTIONS: DIRECTING VERDICT. . An instruction which directs a jury to find for the defendant if a certain state of facts is proved is not equivalent to a direction to find for the plaintiff if any of the facts therein enumerated are not proved.

APPEAL from the district court for Harlan county: ED L. ADAMS, JUDGE. *Affirmed.*

James B. Kelby, H. F. Rose and F. E. Bishop, for appellant.

John Everson and Gomer Thomas, contra.

GOOD, C.

This action was brought to recover for the value of two horses killed on defendant's railway track at a point where defendant was required to fence its right of way. Plaintiff alleged that the fences and gates along defendant's right of way had been allowed to become and remain in a bad state of repair, and that by reason of the condition of the fences and gates plaintiff's horses went upon the track and were killed. The answer was a general denial. Plaintiff had judgment, and defendant has appealed.

The evidence shows that defendant's railway track runs through the farm occupied by plaintiff; that there are three farm crossings on the farm and a gate on each side of the track at each of the crossings. The record shows that the horses were killed on defendant's track at or near the middle crossing. So far as disclosed by the record, defendant's section foreman was the first person who saw the horses after the accident. He testified that the gate at the crossing was open. There is nothing to disclose who left the gate open, nor whether it was open when the horses went upon the track. The evidence tended to show that the fence was in good repair. As to the condition of the gates, the evidence was in conflict. Defendant's evidence tended to show that they were in a good state of repair and were sufficient, when closed, to prevent horses

and other live stock from going upon the track. Plaintiff's evidence tended to show that one of the gates was in a bad state of repair, that it was wholly insufficient to turn live stock, and that live stock had passed back and forth through the gate when closed. The gate is what is commonly known as a "wire gate," and consisted of a number of wires fastened to the gate-post at one end and to a pole or stake at the other. The pole or stake was then fastened up to the opposite gate-post, thus stretching the wires and forming a gate. Plaintiff's evidence showed that a number of wires were broken at the post, and some were broken at the stake or pole; that "the wires were loose and hung low." The evidence is undisputed that the horses went upon defendant's right of way at this gate. Whether the gate was left open and the horses went through the gateway, or whether the gate was closed and the horses went over it because it was insufficient, is unknown.

Defendant contends that the evidence is insufficient to support the verdict. We do not think this contention sound. From the plaintiff's evidence the jury were warranted in finding that the gate was wholly insufficient to prevent the horses from going upon the track, and so found. It was immaterial whether the gate was open or closed, because the closing of the gate would have formed no barrier and would not have prevented the horses from going upon the track.

The court instructed the jury as follows: "It is incumbent upon the plaintiff, before he is entitled to recover, to prove to you by a preponderance of the evidence that the defendant did not keep and maintain its fence in such condition as to render it sufficient to prevent horses and cattle from getting on the track, and, if he so proves, and that his horses were killed, and the value thereof, then your verdict should be for such sum as you find he has sustained by reason of the killing of his horses. On the other hand, if you find under the evidence in this case that the defendant has erected a fence and gates at the

place where the accident is claimed to have happened, and that the fence and gates were sufficient to prevent cattle and horses from getting upon the track, then your verdict should be for the defendant." Plaintiff assails this instruction, and contends that it made the company liable if it did not keep and maintain its fence in such condition as to prevent horses and cattle from getting on the track, regardless of whether or not the horses entered through the fence or through the gate by reason of any insufficiency or defect in them, and that proof on the part of the plaintiff of the insufficiency of the fences or gates imposed liability upon the defendant, regardless of whether the animals came through the fence or gates which were defective, or by reason of the defect. We think the instruction is subject to the criticism made. But defendant concedes that the horses entered the company's right of way at the gate. Plaintiff's evidence was amply sufficient to show that the gate was insufficient and constituted no barrier to the horses going upon the right of way. Under the instruction, the jury could not find for plaintiff unless it found that the gate was insufficient to prevent the horses from going upon defendant's right of way. It is clear that the jury so found, and, the evidence showing that the horses entered the right of way at the place so found to be defective and insufficient, we think the conclusion is inevitable that the horses went upon the track by reason of or in consequence of the insufficient and defective gate. The failure of the court to direct the jury that the horses must have come upon the right of way in consequence of the insufficient or defective gate was therefore not prejudicial to the defendant. If there had been any dispute or contention as to whether the horses went upon the right of way at the place where the gate was defective and insufficient, then the instruction would have been prejudicially erroneous.

The court further instructed the jury that, if some one other than the company left the gate or gates open, they being sufficient to turn stock, and the horses strayed upon

Jesse v. Brown.

the track and were killed, the company would not be liable, and their verdict should be for the defendant. Defendant contends that this instruction makes liability follow for failure to maintain the fence and gate in a condition which the jury may think sufficient, and where the loss may have resulted from an entirely foreign cause. The instruction is not subject to the criticism made. It nowhere directs a finding for the plaintiff. The instruction directed a finding for the defendant if a certain state of facts was found to exist. It is not equivalent to directing a verdict for plaintiff if any of the facts therein were not found to exist. The most that can be contended for is that the instruction did not state defendant's theory of the case as strongly as it was entitled to have it stated. What has been said with respect to the first instruction is applicable to the present instruction.

We find no prejudicial error in the record, and therefore recommend that the judgment of the district court be affirmed.

By the Court: For the reasons given in the foregoing opinion, the judgment of the district court is

AFFIRMED.

MARY E. JESSE ET AL., APPELLEES, V. LAFE BROWN ET AL.,
APPELLANTS.

FILED JANUARY 23, 1909. No. 15,415.

Cancelation of Instruments: EVIDENCE. Evidence examined and discussed in the opinion, held sufficient to sustain the judgment of the district court.

APPEAL from the district court for Jefferson county:
WILLIAM H. KELLIGAR, JUDGE. *Affirmed.*

Heasty & Barnes, for appellants.

Talbot & Allen, T. W. Tipton and C. H. Denney, contra.

Jesse v. Brown.

John C. Hartigan, guardian ad litem.

GOOD, C.

John Brown died intestate on the 7th day of May, 1906. A few hours previous to his death he attempted by warranty deed to convey to his son Lafe Brown the northwest quarter of section 13, township 1, range 4 east of the sixth P. M., in Jefferson county, Nebraska. This action was brought by certain of the heirs of John Brown against all of the other heirs at law of John Brown, including Lafe Brown and his wife, Etta Brown. In their petition the plaintiffs alleged that on the 7th of May, 1906, John Brown was the owner of said premises; that he was a man 98 years of age, mentally weak on account of his age, very deaf, almost blind, seriously and dangerously sick; that he could never read, write, nor sign his name; that he died about 11:30 P. M. of said day; that, about five hours before the death of said John Brown, the defendant Lafe Brown intending to cheat and defraud the other heirs at law of said John Brown, fraudulently induced him to sign a warranty deed conveying said premises to said defendant; that no consideration was paid for said transfer; that by reason of said John Brown's physical and mental disabilities he was incompetent to transact any business, and that said deed was never delivered; that for more than three years prior thereto said John Brown had been living with the defendant Lafe Brown and family on said premises, and that by reason thereof, and the relationship of father and son, and the infirmities of said John Brown, the defendant Lafe Brown was able to and did, by undue influence, induce said John Brown to execute said deed, and thereby fraudulently procured title to said premises. They prayed for a cancellation of the deed, and that the title to the premises be quieted and confirmed in all of the heirs at law of John Brown, deceased.

The defendant Lafe Brown answered, and alleged that on or about the 2d day of March, 1903, the said John

Jesse v. Brown.

Brown and said defendant entered into an oral agreement, by the terms of which said defendant and his family were to move upon and take possession of said premises, care for said John Brown, furnish him a home with said defendant, with the necessary food and such care and attention as he should need in sickness and in health during the remainder of his natural life, and in consideration thereof and of natural love and affection said John Brown was to convey said premises by good and sufficient deed to said defendant; that pursuant to said agreement said defendant and his family moved upon and took possession of said premises, and fully complied with the terms of said agreement until the death of said John Brown; and that pursuant to said agreement the said John Brown, while in possession of all of his faculties, executed and delivered said deed to said defendant, and thereby conveyed said premises to him. Said defendant prayed, among other things, that if the court should find that there was no delivery of said deed, or that the said John Brown at the time of the execution thereof was incompetent to execute the same, the court should decree specific performance of said oral agreement, and that his title to said premises be quieted and confirmed. All of the defendants other than Lafe Brown and his wife joined with the plaintiffs in asking the same relief as prayed for in the petition. All of the affirmative allegations of the answer were denied in the reply.

A trial was had upon the issues so joined. The court found that the deed was made without consideration, was procured by undue influence exercised by the defendant Lafe Brown, and was executed when said John Brown was incompetent, and that there was no delivery of the deed. It further found that no contract was entered into between said defendant and John Brown whereby the latter agreed to convey the lands to said Lafe Brown. The court entered a judgment in conformity with its findings. From that judgment the defendants Lafe Brown and Etta Brown have appealed.

Jesse v. Brown.

The only assignments of error relied upon by appellants are that the judgment is contrary to the weight of evidence and is not sustained by sufficient evidence.

We will first consider the evidence relating to the competency of John Brown to make the deed on May 7, 1906. The record shows that Mr. Brown was 98 years old; that he could neither read nor write; that he was hard of hearing, and his eyesight greatly impaired. In addition to the land in controversy, he owned 480 acres of other land, which he rented, and that he personally superintended the marketing of his grain and the collection of his rents; that he had been vigorous mentally and physically until the later years of his life, when he became somewhat feeble, eccentric, filthy and careless in his personal habits; that he would go to bed with his clothes and muddy boots or shoes on, and on a number of occasions had shown a disregard of the proprieties in exposure of his person; that he kept a tub of water standing in his room without any known reason therefor, and on one occasion he lost his way with his horse and buggy upon the highway and wandered into a field, and did other things tending to show a mental decline. A number of witnesses testified that they did not think him competent to transact business during the last two years of his life. For three years before Mr. Brown's death Lafe had rented and cultivated the farm in controversy, and he and his family had occupied the residence except the one room occupied by the father. Lafe and his family furnished the old gentleman with his meals, and took care of his room and did his washing. For two weeks previous to his death he was too feeble or ill to go to the table for his meals. On the 6th of May he was suffering from a cold and pain in his side, and a physician was consulted and prescribed for him. On the morning of the 7th the physician was called and examined him, and testified that he found Mr. Brown with a temperature of 101, his pulse 110 to 120, and his respiration 28 to 30; that his right lung was filled with mucus or phlegm, and his left lung somewhat involved,

Jesse v. Brown.

and that he was suffering from lobar pneumonia with pleurisy complications. It is evident that the doctor considered Mr. Brown dangerously sick, and so informed Lafe and his wife, for they immediately thereafter sent telegrams to various members of the family in different states informing them of Mr. Brown's sickness and asking them to come. On the afternoon of May 7 Lafe telephoned to Mr. Price, a banker and notary public at Diller, to come out and draw some papers for his father. According to the evidence of Etta Brown, Lafe's father had requested that Mr. Price be sent for. There is some difference in the testimony as to the time Mr. Price arrived at the Brown residence. Upon a consideration of all the evidence and the circumstances, it appears reasonably certain that Mr. Price reached the Brown residence a little after 6 o'clock in the afternoon. Mr. Price testified that he was informed by Lafe that his father wished him to draw a deed conveying the 160 acres upon which they lived to Lafe Brown; that he went to Mr. Brown's bed and roused him, and asked him how he was feeling, to which Mr. Brown responded: "Oh, I want to rest"; that he inquired of him if he wished him to draw a deed to his son for the 160 acres of land on which he lived, and Mr. Brown said, "What"? that he repeated his question, and Mr. Brown answered "Yes"; that the deed was drawn, and he took it to Mr. Brown informing him what it was and asking him if he wished to sign it. Mr. Brown again responded "Yes." Mr. Brown was propped up in bed, and placed his hand upon the pen, which was guided by Mr. Price in making his mark. Mr. Price then asked Mr. Brown if it was his voluntary act and deed, and he again said "Yes." Without any direction from Mr. Brown, Mr. Price handed the deed to Lafe, informing him it would be necessary for him to bring the deed in to town to have the notarial seal placed upon it. Lafe handed the deed back to Mr. Price, directing him to put his seal upon it and send it to Fairbury for registration. Mr. Price was at the Brown residence for half an hour or more, and the

Jesse v. Brown.

foregoing is all that is shown to have been said by Mr. Brown during Mr. Price's visit. Mr. Price saw nothing to lead him to believe that Mr. Brown did not understand or comprehend what he was doing. At 7 o'clock Mr. Brown became unconscious, and so remained until his death at 11:30 that night. It is apparent that he became unconscious within a few minutes after the signing of the deed, and died five hours later. Mrs. Etta Brown testified that after Price had gone Mr. Brown asked Lafe if he was satisfied with what he had done. From other witnesses it appears that Mr. Brown was in more or less of a stupor during the afternoon previous to his death. Upon hypothetical questions fairly reflecting Mr. Brown's condition and illness, four physicians testified that in their opinion he was wholly incompetent to transact any business at the time of the signing of the deed. They testified that the filling up of the lungs with mucus and phlegm prevented access of sufficient air to the lungs to properly oxidize the blood, and that the necessary result thereof was that the patient became dull, stupid, and relapsed into a comatose condition, from which he might be roused and might temporarily know what was said to him, but that he would be without power to reason or think connectedly or to understand any business transaction.

From the consideration of this testimony and from other circumstances needless to mention, we think the evidence warranted the finding that Mr. Brown, by reason of his advanced age, feeble condition, and serious illness, was incompetent to comprehend or understand what he was doing at the time he signed the deed. In this connection it is proper to say that the only evidence tending to show that Mr. Brown was competent at the time of signing the deed was that of Mrs. Brown, Mr. Price and Dr. Pritchard. Mrs. Brown was an interested witness, and in addition thereto her testimony is in direct conflict with that of a number of disinterested witnesses on several material points. With reference to Mr. Price, it will be ob-

Jesse v. Brown.

erved that his opinion was based upon a visit of a half an hour, and that during that time Mr. Brown spoke less than 20 words, and spoke no word except when he was aroused and in response to a question, and that one of the questions had to be repeated to him before he apparently understood it. We are of the opinion that the evidence of the physicians as to Mr. Brown's mental condition was entitled to greater weight than the opinions of Mr. Price and Mrs. Brown. The findings of the district court that Mr. Brown was incompetent to make the deed was entirely justified by the testimony.

The only evidence of the existence of an agreement between Mr. Brown and his son Lafe for the conveyance of the land is that of Mrs. Etta Brown. She testifies that in September, 1902, she heard a number of conversations between Mr. Brown and her husband to the effect that, if Lafe would move onto the farm and take care of his father during the rest of his life, his father would convey to him the quarter section of land. As before noted, the testimony of Mrs. Brown was in direct conflict with that of a number of other witnesses, some of whom were disinterested. In June, 1903, Mrs. Brown wrote a letter wherein she stated that her husband was bound to go to Oklahoma the coming fall, and if he liked it to buy a farm there. On one occasion after the making of the alleged contract, Mrs. Brown is shown to have requested Mr. Brown to convey the land to her husband, and that he refused, and said they should get their start as he got his. On one occasion Lafe is shown to have unsuccessfully tried to induce his father to make a will leaving him the farm. At a meeting with his brothers and sisters in Illinois immediately after his father's funeral he told his sisters and brothers that his father had not recompensed him for his care of him, that his father had done nothing for him. On the night of his father's death he told two of his neighbors that his father had but a short time previously made a will leaving him 160 acres of land, and \$4,000 out of his other property, and that his father had thought that was

In re Estate of Frederick.

too much, and had changed it and had left him 160 acres by will. Lafe, some weeks after his father's death, when questioned as to the deed, said: "Father had always said he would give me a farm." On one occasion after the making of the alleged contract, when his father found fault with him for the way in which he managed the farm, Lafe said: "If you are not satisfied with the way I am farming your place, just get Walter Ross back here." Another significant fact is that no one outside of the interested parties ever heard of the making of the alleged oral agreement until long after the death of Mr. Brown. From a consideration of this evidence, we do not think it can be said that the contract has been proved by clear and satisfactory evidence. The burden of proof was upon the defendant Lafe Brown to establish the contract by clear and satisfactory evidence. *Harrison v. Harrison*, 80 Neb. 103; *Peterson v. Estate of Bauer*, 76 Neb. 652, 661, and cases there cited. In view of all of these circumstances, we think the contract is not clearly and satisfactorily proved.

The judgment of the district court is right, and should be affirmed.

DUFFIE, EPPERSON and CALKINS, CC., concur.

By the Court: For the reasons given in the foregoing opinion, the judgment of the district court is

AFFIRMED.

IN RE ESTATE OF WOLFGANG FREDERICK.

A. M. ROBBINS, EXECUTOR, ET AL., APPELLANTS, V. MARILLA FLYNN, APPELLEE.*

FILED FEBRUARY 6, 1909. No. 15,494.

Wills: TESTAMENTARY CAPACITY. A will was presented to the county court of V. county for probate. A contest was instituted upon a number of grounds, among which was that the testator was not

* Rehearing denied. See opinion, p. 321, *post*.

In re Estate of Frederick.

of sound mind at the time of executing the will. This contention was supported by evidence sufficient to justify the submission of the issue to the jury, who found in favor of the contestant.

APPEAL from the district court for Valley county:
JAMES R. HANNA, JUDGE. *Affirmed.*

A. M. Robbins, Robbins Bros. and Clements Bros., for appellants.

John J. Sullivan, A. Norman and A. R. Honnold, contra.

REESE, C. J.

This cause originated in the county court of Valley county by the presentation for probate of a will alleged to be the last will and testament of Wolfgang Frederick, deceased. A contest was filed by Marilla Flynn, his daughter and only heir, in which a number of grounds or reasons for the contest were stated; but as we view the case but one need be here noticed, and that is whether at the time of the execution of the will the deceased was of unsound mind. The hearing in the county court resulted in a finding by the county judge that at the time of the execution of the will the deceased was incompetent to make a will, and probate was denied. The cause was appealed to the district court, where a jury trial was had, and a verdict was returned finding in favor of the contestant, and that the paper proposed was not the valid will of the deceased. A motion for a new trial was filed, which was overruled, and the usual judgment denying probate was entered. The cause is appealed to this court.

The record is voluminous. We have read it carefully throughout. The evidence as to the mental capacity of the deceased, covering a period of some 30 years, was conflicting. Many facts stated by the witnesses on the part of the contestant show marked eccentricities of the testator, and upon some subjects an unbalanced mind. He left his wife, and possibly other members of his family, in Wis-

consin in the early 70's, bringing with him the contestant, then a little girl, taking a homestead, where he settled. The Indians at that time were supposed to be inclined to attack settlers, but he would leave her alone and unprotected to such an extent as to cause his neighbors deep solicitude on her behalf. The evidence shows a state of mind throughout his whole life on the frontier and while an inmate of the soldiers home at Leavenworth, which on some subjects was irrational and unreasoning, and which from imaginary and unreal causes would cause him to forget his obligations to his daughter, who in later years was in absolute want, with a family upon her hands, and whose husband had died.' In the will presented, and which was the last of a number of wills made, he without any known cause practically disinherited his daughter and cast nearly all of his property upon a stranger to whom he was under no obligations and in no sense related. The evidence shows that he had at times taken a dislike to his daughter and determined to furnish her no aid or assistance, but, upon discussing the matter with friends, would declare she was worthy of his bounty and should have his property. This inclination would soon disappear, and he would declare his determination to leave what he had to strangers. Witnesses testified to his conduct and weakened and distorted mind, especially with reference to his daughter. That this unnatural, irrational and unreasonable feeling was the cause and produced the will in question there seems to be no doubt from the evidence. At any rate there was sufficient proof of his unsound mental condition to justify the submission of the case to the jury upon that issue. This being true, the verdict must be sustained.

In arriving at the conclusion here announced, we have refrained from quoting, or even summarizing, the evidence introduced, for the reason that it would extend this opinion to an unreasonable length and it could serve no good purpose to do so. The will was executed at Leavenworth, Kansas, in the absence of either the devisee or her

father Mr. Robbins, who was named as executor. Mr. Robbins had been the testator's trusted attorney, agent and adviser for many years. The testator had met the devisee but once, and then for only a short time. We are unable to find anything in the evidence reflecting upon the conduct of either which could be said to have exerted any undue influence upon the mind or action of the testator, except such as might naturally arise in his mind from the relations existing between him and Mr. Robbins. After the death of the testator, Mr. Robbins was informed of the existence of the will, and, as was his duty, he presented it for probate.

Finding sufficient evidence in the record to sustain the verdict of the jury upon the one contention, we deem it unnecessary to pursue the subject further. The judgment of the district court is

AFFIRMED.

The following opinion on motion for rehearing was filed April 24, 1909. *Rehearing denied:*

PER CURIAM.

A motion for a rehearing has been filed in this case supported by a vigorous brief, in which our attention has been challenged to an expression found in *Buchanan v. Belsey*, 72 N. Y. Supp. 601, and *Cash v. Lust*, 142 Mo. 630, 64 Am. St. Rep. 576, which reads as follows: "Where a will is contested on two grounds, and the jury find in favor of the contestants, but it cannot be told upon which ground; the verdict must be set aside, if there was a failure of proof upon either ground." 64 Am. St. Rep. 576. It is conceded that this expression is contrary to the general rule which prevails in ordinary civil cases, but it is insisted that the rule should be applied to the case at bar. It is not necessary for us to determine this matter, for we are satisfied from a further and more critical examination of the record that there was substantial evi-

Selfert v. Dillon.

dence requiring the submission of both grounds of contest, to wit, undue influence and want of testamentary capacity, to the jury.

It appears that for many years the proponent had been the sole attorney and confidential adviser of the testator; that such friendly relations existed between them as to induce the testator to loan money to the proponent at an unusually low rate of interest, and in some cases interest was entirely forgiven; that after the testator went to the soldiers home at Leavenworth, Kansas, the proponent continued to care for and conduct his business affairs; that much correspondence passed between them, and these facts, with other circumstances detailed by the evidence, in view of the confidential relation of attorney and client which existed between them, required the submission of the question of undue influence, as well as the question of testamentary capacity, to the jury for their determination. This being so, the cases above mentioned are not in point, and the verdict of the district court must be sustained.

For the foregoing reasons, among others, we are satisfied that the motion should be overruled, and it is so ordered.

REHEARING DENIED.

CHARLES E. SEIFERT, APPELLEE, v. ROSE DILLON, APPELLANT.

FILED FEBRUARY 6, 1909. No. 15,507.

1. **Nuisance: INJUNCTION: DEFENSES.** The right of a landowner to restrain an adjoining property owner from using his property as a bawdyhouse, or house of ill fame, to which persons resort for the purposes of prostitution and lewdness, is a right belonging to the land, and the fact that defendant's premises were so used before plaintiff purchased his property constitutes no defense to an action to enjoin the same.

2. ———: ———. The illegal use of property as a house of ill fame constitutes a continuing injury to a nearby property owner which is unaffected by lapse of time.
3. ———: ———: DEFENSES. The fact that municipal authorities tolerate the maintenance of a house of prostitution on defendant's property, and thereby violate the law themselves, constitutes no defense to a suit by a nearby property owner to enjoin such maintenance, special damages being shown.
4. ———: ———: SPECIAL INJURY. Where a nearby property owner and those in his employ are compelled to witness indecent conduct of the inmates of a bawdyhouse, and to hear loud, boisterous, indecent and annoying noises made by them and their dissolute companions, he thereby suffers a special injury different from that suffered by the general public, and is therefore entitled to enjoin the same, notwithstanding the maintenance of such place is a public nuisance.

APPEAL from the district court for Lancaster county:
EDWARD P. HOLMES, JUDGE. *Affirmed.*

T. J. Doyle, G. L. De Lacy and James E. Philpott, for appellant.

John M. Stewart and D. H. McClenahan, contra.

REESE, C. J.

This action was instituted in the district court for Lancaster county by the plaintiff, who is a merchant engaged in business at No. 133 South Ninth street in the city of Lincoln, and against the defendant, the keeper of a house of ill fame at No. 124 on the same street, being diagonally across the street and nearly opposite plaintiff's place of business. From the pleadings and evidence it is shown that O street is one of the principal business streets of said city, and that the properties referred to are south of said street, and within less than a block thereof, and within that part of said city used for general business purposes. The place of business of plaintiff is in a two-story brick building, both floors of which are used in the conduct of the business, which is a general store for the sale of harness, fur coats, work coats, mit-

tens, gloves and bicycle supplies. The value of his stock of goods is about \$7,000. The building occupied by defendant is a two-story brick, and is confessedly used by her as a house of prostitution.

It is alleged in the petition that defendant is using and intends to continue the use of said building as a bawdy-house and house of prostitution, wherein are kept a large number of prostitutes under the control and charge of defendant, and as a resort of prostitutes and licentious men, and is resorted to at all times of the day and night by persons of that description, and is a disorderly house where fighting and brawls, drinking of intoxicating liquors, and disturbances of the peace continually occur; that from the doors and windows of said house passers-by are hailed by the prostitutes and invited to licentious commerce with them, and indecent exposures of their persons are made therefrom, and that the house as kept and used is a nuisance, and a detriment to plaintiff, his business and his property; that plaintiff's property has been greatly depreciated in value, and the rental value thereof greatly lessened; that he is deprived of the comfortable use and enjoyment of the property, and his business has been injured by the loss of customers who are unwilling to visit his store on account of the disgraceful and indecent acts and conduct of defendant and those kept by her and who frequent her place. The prayer of the petition is for an injunction restraining defendant and those under her control or authority or procurement from using the property or any part thereof for the purposes of prostitution, or keeping or maintaining a disorderly or bawdy-house upon said premises. The answer admits the location and use of the properties as alleged, and avers that both are situated "in the immorally submerged part of said city"; that there are other houses of prostitution and a number of saloons in the immediate vicinity; that her house has long been kept and used for the purpose named; that plaintiff was reared from boyhood in the immediate neighborhood, and, knowing the use to which defendant's

property was devoted, had purchased the store and business. All averments of the petition charging offensive acts or boisterous noises as well as damages to plaintiff are denied, and she avers that she has at all times maintained a quiet and orderly house, which has been closed to men of vicious, brutal and degenerate character when known to her. A trial was had in the district court, which resulted in a finding in favor of plaintiff, and enjoining defendant and all others acting with her consent and authority from using said premises as a bawdyhouse or a house of prostitution and maintaining or operating the same for such purposes. Defendant has appealed.

There is not much question as to the facts in the case. The principal dispute thereon is as to whether the proof sustains the finding of the court as to a special injury to plaintiff as distinguished from the injury to the public generally sufficient to justify the issuance of an injunction in favor of plaintiff personally. It is not deemed necessary here to set out the evidence in detail, except to say that enough is shown to support a finding that the averments of the petition are sustained by the proof that the maintenance of the house of defendant as a bawdyhouse has contributed to the depreciation of the value of plaintiff's property and the rental thereof, and has rendered his place of business an undesirable one, has prevented the extension of his local trade, and has been and is a source of annoyance to him, his clerks, and customers; that men and women of vicious, lascivious and drunken habits congregate at her house and along the street and sidewalk adjacent to plaintiff's property, and engage in brawls and fights to such an extent as to prevent respectable customers from frequenting his place of business. It may be said that it is true that these acts have been indulged in to a less extent in later years than formerly, yet enough is shown to justify the finding that they have been continued until recently before the beginning of the suit.

The principal contention is as to the law to be applied.

It is a generally accepted rule of law that a private individual may not enjoin a nuisance of a public character unless he can show that he suffers damages or injury which is special to himself or his interests; that public nuisances are criminal in their nature and can be suppressed by the enforcement of the criminal law applicable to such cases. It is conceded that the house of defendant is a bawdyhouse, and that she maintains it as one of that character; but it is insisted that she is subject only to the action of the state in the enforcement of the criminal law in the usual way. In support of this, a number of authorities are cited, which we do not deem it necessary to notice further, for the reason that, as a general rule, the position must be conceded. See 1 High, Injunctions (4th ed.), sec. 762. A bawdyhouse is a public nuisance. 1 Wood, Nuisances (3d ed.), sec. 29; Criminal code, sec. 210.

In order to avoid the extension of this opinion to an unreasonable length, we will treat the assignments of defendant together. They are, not only that plaintiff has failed to show a sufficient personal interest to enable him to rightfully maintain the action, but that by his laches he has forfeited his right, if any ever existed, to seek the remedy of injunction in his own behalf. It is said in defendant's brief that "prescription will not run against a public nuisance so as to defeat the abatement of it by public authorities. But the appellant contends that prescription does run against the right of a private citizen to abate a public nuisance by injunction." Under certain conditions this is probably true, but we hardly think such a rule could rightfully be invoked in a case of this kind. The case of *Ingersoll v. Rousseau*, 35 Wash. 92, was much like the one now under consideration in its facts. The action was brought by a lot owner in the city of Everett against the owner of an adjoining lot to restrain him from maintaining a house of ill fame upon said adjoining lot. The issues were quite similar to those here presented. The court held that such illegal use of property could not be continued over the objection of the plaintiff in the

case, upon the ground that defendant's property was so used before the plaintiff purchased; that the right of the plaintiff to maintain the action was not affected by lapse of time; that the fact that the authorities of the municipality tolerated the maintenance of the house of prostitution (as shown in this case) was no defense; and that where the adjoining proprietor was compelled to witness indecent conduct of the inmates of the bawdyhouse, and listen to the loud, boisterous and unseemly noises made by them and their dissolute companions, he thereby suffered a special injury different from that of the general public, and was therefore entitled to enjoin the same, notwithstanding the maintenance of such a place was a public nuisance. In *Dempsie v. Darling*, 39 Wash. 125, it was held that the owner of a vacant lot upon which he desired to construct a building to be used for a lawful purpose had the right to enjoin the owner of an adjoining lot from continuing a house of prostitution then in existence. See, also, *Wilcox v. Henry*, 35 Wash. 591. *Blagen v. Smith*, 34 Or. 394, was where the defendant had remodeled certain buildings and was about to rent them to be used for immoral purposes. In many other respects the questions involved were quite similar to those presented in this case. The supreme court of Oregon, in quite an elaborate opinion, held that a house of ill fame is a public nuisance, but that the plaintiff being the owner of adjacent property could enjoin its use or continuance. To the same effect are *Weakley v. Page*, 102 Tenn. 178, 53 S. W. 551; *Marsan v. French*, 61 Tex. 173; *Cranford v. Tyrrell*, 128 N. Y. 341. The case of *Ingersoll v. Rousseau*, 35 Wash. 92, is republished and annotated in 1 Am. & Eng. Ann. Cas. 35. The heading of the note at page 38 in referring to the principal case says: "This case is clearly within the rule that private citizens may maintain a suit to enjoin a nuisance where special injury is suffered. The particular nuisance which produces the injury is immaterial, provided it is of such character as to cause special damages to certain persons"—citing a number of cases from England,

Smullin v. Wharton.

Canada, the United States, and more than half of the state supreme courts. It seems that there can be no doubt as to the rule or that plaintiff has brought himself within it by the pleadings and evidence.

We have not overlooked the cases cited by counsel for defendant, but cannot here review them. They generally state the correct rule, but are not decisive of the case in hand.

It follows that the decree of the district court making the injunction perpetual must be, and is,

AFFIRMED.

FAWCETT, J., not being present at the time of the argument, took no part in the decision.

MARGERY H. SMULLIN ET AL., APPELLEES, v. IDA M. WHARTON ET AL., APPELLANTS.

FILED FEBRUARY 6, 1909. No. 15,840.

1. **Wills: CONSTRUCTION: ALLOWANCE TO WIDOW: INTEREST.** As construed upon a final adjudication, the will of G. B. bequeathed and devised a portion of his estate to a trustee, the income, and, if necessary, a portion of the body of the trust estate, to be applied to the maintenance and support of I. B., his wife, the surplus of the income to be divided between his collateral heirs, and upon the death of I. B. the whole of the trust estate to pass to and be divided between such heirs. There was nothing in the will fixing the amount which I. B. might receive and retain annually for her maintenance. In an action seeking a decree fixing such sum as she might retain and for an accounting, the district court by its decree fixed the amount at \$5,400 per annum. *Held*, That the legal effect of the decree was the same as though that sum had been written in the will, and should take effect from the date of the death of the testator, but subject to the deduction of all sums received from the trust estate by said I. B.; and for the purpose of ascertaining the amount due, if anything, an accounting should be had and decree rendered in favor of I. B. or against her as the balance might appear, but that in rendering such account neither party would be entitled to interest upon annual balances.

Smullin v. Wharton.

2. ———: **CONTEST: COSTS.** Where there was a contest of such will, the contestants seeking to prevent the probate thereof, and which contest caused long and expensive litigation, the will being finally admitted to probate, the reasonable and necessary attorneys' fees and expenses in defending against such contest should be charged to the estate devised and bequeathed by the will. And the fact that other property, named and specified in the will, was devised and bequeathed to I. B., but which was, after the making of the will, and before the death of the testator, conveyed and transferred to her personally, would not affect her rights, as the title to such property was not involved in the contest of the will.
3. ———: **COSTS.** On a trial of an action against I. B. and the trustee for an accounting, and which trial necessarily resulted in the decree fixing the amount which I. B. was entitled to retain annually from the trust fund in her hands for her maintenance and support, under the provisions of the will as construed, there being no other method of ascertaining and fixing such amount, the same not having been previously ascertained, the taxable costs should be charged to the estate, and not against I. B. personally. The language of LETTON, J., quoted in the opinion, had no reference to the accumulation of costs in subsequent proceedings.

APPEAL from the district court for Douglas county:
HOWARD KENNEDY, JUDGE. *Reversed with directions.*

W. W. Morsman, for appellants.

John C. Cowin, J. H. McIntosh and F. A. Brogan,
contra.

REESE, C. J.

For a statement of the issues and facts in this case up to the filing of the opinions reported in 73 Neb. 667-711, we need only refer to the record in the report of the decisions. The cause was remanded to the district court, and by the mandate issued by the clerk of the supreme court, of date October 8, 1907, the district court was directed to "take an account of and ascertain what sum per annum is sufficient to support and maintain the appellee, Ida M. Wharton using the family homestead, according to the style of living to which she was accustomed at the time of the death of the testator, and to charge the pay-

ment of the same annually during her life upon the income of the trust estate devised to Westerfield, and upon the corpus thereof if the income is insufficient, and according to the conditions of said trust; second, to charge the said appellee as trustee in trust to pay and distribute annually all such surplus income from the trust estate, if any there be, after providing for the maintenance of the appellee as aforesaid, and such gifts to charitable purposes as she may desire to make from time to time, not exceeding \$10,000 in all, to the brothers and sisters of the testator, share and share alike, the issue of deceased brothers and sisters, if any such issue, to take the share of the deceased parent; third, for such other accounting and decree as may be necessary to carry fully into effect the provisions of the constructive trust declared to exist and of the trust declared by the will in Westerfield, and according to the views expressed in the opinion by Chief Justice HOLCOMB, and the subsequent opinions of this court." The commanding part of the mandate is practically a repetition of the above, and need not be further copied here. A copy of the opinion by Judge LERTON (73 Neb. 706) was attached to the mandate and made a part of it.

Upon the reappearance of the case in the district court, a number of amended and supplemental pleadings were filed, but it is not deemed necessary to set them out, as they consisted principally in shaping the issues to correspond with the mandate and opinion of this court. They also contained statements of accounts of moneys received and expended by defendant and the trustee, and a list of the property of which the testator died seized. Defendant claimed that the amount of money to which she was entitled, as of her own, absolutely, out of the trust estate, was \$7,200 per annum, as and for her maintenance according to her previous style of living, while plaintiffs insisted that \$2,000 per annum would be a sufficient allowance. The cause was tried to the district court, which resulted in an extended and elaborate find-

ing of facts and decree fixing the amount which defendant could retain for her maintenance and support at \$5,400 per annum, the allowance beginning January 1, 1908, and also allowing her to make donations to charitable purposes, as indicated in the will, and approving and allowing her for moneys paid out for taxes, improvements of the trust property, and directing that the same be paid out of the trust fund for her reimbursement. Her claim for moneys paid for attorneys' fees and expenses growing out of the litigation in the contest of the will of the testator by plaintiffs was allowed in part, and the costs of this suit were adjudged against her personally. From this decree she appeals, assigning as error the ruling of the district court limiting the allowance of \$5,400 for her maintenance to begin January 1, 1908, instead of June 1, 1895, the date of the death of the testator, and refusing to allow interest at 7 per cent., that the court erred in not allowing her a sufficient sum for her expenses incurred in the litigation in which the will was established and admitted to probate, and that the court erred in adjudging her to pay the costs of this action. The case is brought here upon the pleadings, the findings and decree alone. Defendant presents no bill of exceptions. All orders and parts of the decree allowing her for moneys expended, payment of commissions, and for services of the trustee, in fact all findings not involved in the three assignments above pointed out, stand affirmed, approved and as final, and will not be noticed herein. There is no appeal from the action of the trial court in fixing the amount to which defendant is to be entitled at \$5,400 per annum, and that part of the decree will stand without review, save as to the date from which the allowance is to be made, and, in case it is directed to have its beginning at an earlier date, upon the question of interest.

The contention of defendant is that the allowance, if it might be so designated as determined by the trial court, is and was the first that it has at any time been judicially, or otherwise, ascertained as to what is meant by

Smullin v. Wharton.

the disposition of the property contained in the will, and therefore it is of the same import and effect as if it had been written in the will specifically and must be now so treated; that, had this provision been written in the will, there could be no question but that defendant would have been entitled to that sum out of the trust estate annually from the date of the death of the testator; that the decree of the district court fixing the amount per annum which defendant might retain as hers absolutely should be treated in the same way and governed by the same rule. It is claimed by defendant that, since the estate has been in constant litigation from the time of the proposing of the will for probate to the present, she has not been able to realize the full allowance, and therefore an accounting should be had; that she be credited with the said sum of \$5,400 each year since the death of the testator, and charged with the amount received out of the trust estate and applied to her own use, a balance struck, and if the amount so received and applied by her should be less than the sum fixed, that the difference be decreed to her, with interest thereon from the close of each year to the present time, at the rate of 7 per cent. per annum; that the fixing of the date at January 1, 1908, in the decree cuts off such accounting and is to the prejudice of defendant. It is insisted that defendant has not received to her own use, for any one year, the amount so fixed, and that there is due her, of principal and interest, under this contention, the sum of \$63,077, which the trial court refused to allow. Upon the other hand it is contended by plaintiffs that it was within the jurisdiction and power of the district court to fix upon a date when the allowance should begin to run; and that, since the defendant has had during the time named sufficient to supply her needs, without reference to whether the same was supplied in part from her own means or from the trust estate, and since no greater demand has been made by her than for the amount actually received, no greater allowance should be made. .

As finally construed by this court, the will created a trust or duty on the part of the defendant to distribute the surplus income of the trust estate annually, after supplying her own wants, among the designated relatives of the testator, who to that extent were made legatees under the will; that, while the will was silent upon the subject, yet sufficient was shown of the requests of the testator to his wife, and her agreement thereto, to warrant the reading into the will the provision thus agreed to by her providing for his relatives. By the terms of the will the subsequent conveyances and transfer by the testator of certain property to his wife, and, as held by the former decisions of this court, the property so conveyed and transferred to the wife, forms no part of what is termed the trust estate. As said by Judge LETTON (73 Neb. 708), in referring to this property: "With this property so conveyed the *cestuis que trustent* have no concern whatsoever. They have no interest in it. It belongs to Mrs. Wharton. Both the property itself and the income from it are hers to do with as to her seems best." This being true, it is claimed that, since she is limited to the \$5,400 per annum, it would not be equitable to compel her to rely to any extent upon her own means for her support, thus depleting the amount to which she is entitled, and to the same extent increasing the surplus going to plaintiffs; that, if she is entitled to withhold the sum named under the provisions of the will of her deceased husband, this has been her right each year since his decease, but the segregation of said sum from the trust estate and the distribution thereof has been prevented by the litigation in which the estate has been continuously involved, and has prevented the receipt of the same by her and the distribution of the surplus. Defendant demanded of the court that a finding and decree be entered directing the trustee to pay her the said sum of \$5,400 for each year ending the 1st day of June, commencing June 1, 1895, the date of the death of the testator, less the amounts received by her from said estate each year, with accrued

interest. This the court refused to do, holding, "as a matter of law, that the defendant Ida M. Wharton is not entitled to recover from the trust estate any part of the sum of \$5,400 for any prior year, for the reason that the evidence fails to show that during any such year she actually expended for her support more than she received during the year from the trust estate."

As above suggested, the first and principal question presented is from what date should the allowance be made to run? If the defendant's contention that the effect of the decree is that the sum of \$5,400 should, by virtue of the decree, be treated as if written in the will in terms, it would seem that it should have been held that the sum thus ascertained as the amount to be retained for the sole use of defendant must date from the death of Mr. Boggs, the testator. The provision of the will, as finally construed, is that defendant shall receive to her own use from the trust estate a sufficient sum of money annually to maintain and support her according to her standard of living prior to the death of her husband, no definite sum being named. The district court by its decree has said that the amount of money annually necessary to such maintenance is \$5,400. This, if correct now, must have been the correct amount during the whole time since the right accrued, else it would be fluctuating and changing each year, and nothing could be said to be fixed or determined by the decree, the whole inquiry remaining open for modification and change by any subsequent ruling. This is not, and cannot be, the case. The amount fixed by the court is to stand as a permanent finding and decree. It is a judicial declaration that the will shall read "\$5,400 per annum to defendant, the surplus to plaintiffs." If this be correct, it would seem that the question is one of easy solution. Treating it as though the sum fixed by the court was within the will, as we must, it follows that defendant has been entitled to the retention annually from the trust fund of the amount named. The rule declared by some of the English courts seems to be

that, if the annuity is payable from the body or principal of a fund, the first payment is due at the end of the first year after the death of the testator. But, if it is payable only out of the interest or income of the fund, it becomes due at the end of the second year. 1 Roper, Legacies, p. *877. The reason for this distinction arises out of the fact that in the latter case there must be sufficient time after the settlement of the estate for the interest upon the principal fund to accumulate. The rule, however, has been questioned, and by some it has been held that the annuity would become due at the end of the first year in either event. See *Estate of Flickwir*, 136 Pa. St. 374.

It is an elementary rule that the provisions of a will take effect and become operative at the time of the death of the testator. By the provisions of the will itself, unaided by extrinsic evidence, there is no specific trust imposed upon defendant with reference to the income or body of that portion of the estate devised and bequeathed to the trustee. The clause included in the trust provision conferring any rights or interest in the estate is the fourth thereof, which makes it the duty of the trustee, upon the death of the wife of the testator, defendant herein, to divide the remaining portion of the trust estate equally between his brothers and sisters, or, in case of the decease of any of them leaving issue, that such issue receive the portion that the parent would have received had he or she been living. But, as has been declared in the previous decisions, a contemporaneous conversation and agreement between the testator and his wife created a trust in their behalf, said trust being engrafted upon and read into the will, doubtless as giving effect to the trust created in and by the will. By the terms of the mandate issued from this court to the district court, the latter court was "commanded, without delay, to take an account and ascertain what sum per annum is sufficient to support and maintain the appellee, Ida M. Wharton, using the family homestead, according to the style of living to which she was

accustomed at the time of the death of the testator, and to charge the payment of the same annually during her life upon the income of the trust estate devised to Westerfield, and upon the corpus thereof if the income is insufficient, and according to the conditions of said trust." This command was the warrant of authority to the district court to make that inquiry. There is no intimation that the inquiry should be limited to the present or future, no time limit being suggested. If the will, when considered in the light of the agreement of the parties, the agreement being a part thereof, as between the testator, his wife and plaintiffs, created and suggested the trust, it must be considered as a part thereof, and as taking effect at the time of the death of the testator, and therefore the district court had not the power to impose the limitation as to time. We are persuaded that this must be the case, since it was evidently not the intention of the testator that his wife should in any event be compelled to maintain herself from her own estate, for it is expressly provided in the will that the trustee shall deposit in the bank to the credit of defendant during her life, for her own use, all rents, issues and profits of the trust estate, such deposits to be made promptly upon the collection of the income. Nothing could be plainer than that it was the purpose of the testator that his wife should have her living and maintenance out of the trust estate, and that the property conveyed and bequeathed to her should be free from this burden, but should be hers absolutely. From the pleadings, findings and decree it is apparent that she has not received the full amount which it is now for the first time established is given her by the will from the trust estate, but that she has received the same in part. An accounting will have to be had, in which she will be credited with the sum of \$5,400 annually since the first day of June, 1895, and charged with what she has received and appropriated during that time. Should a balance be found due her, the same should be decreed to her out of the trust estate. Should it be found that she has received more

than the amount of such allowance, she will be required to refund the excess. As to the demand for interest at the rate of 7 per cent. upon the several balances from the end of the year for which they were due, there can be little, if any, doubt but that the general rule of law is that, in ordinary cases of legacies bequeathed, the legatee is entitled to interest at the legal rate from the time they could be legally demanded. In the case *In re Woodward's Estate*, 78 Vt. 254, the question arose as to when pecuniary legacies would begin to draw interest, and it was held that, under the law of that state, interest would begin to accrue at the end of the first year from the death of the testator, unless otherwise provided in the will. The case is annotated in 6 Am. & Eng. Ann. Cas. 524, and the decisions of the courts of this country are quite thoroughly collated. From the citations given, we conclude that, in the absence of modifying statutory provisions, that is the general rule. It may be suggested that probably the rule is modified by the statutes of this state. Sections 244, 245, ch. 23, Comp. St. 1907, provide, in substance, that the county court at the time of granting letters testamentary shall make an order allowing to the executor a time for disposing of the estate and paying legacies, which may be, in the first instance, one year and six months, but that time may finally be extended to three years. By sections 288 and 289 it is provided that, after the proper allowances have been made for the support of the family of the deceased, the amounts due legatees from the estate may be distributed and assigned to those entitled to participate therein, and by section 290 the distribution must be by decree, naming the parties entitled to such participation, and they shall (then) have the right to "demand and recover their respective shares from the executor." By these sections it would appear that none of the legacies are due and demandable until after the entry of the decree provided for, and therefore they could draw no interest prior to that date. If this be the

Smallin v. Wharton.

case there could be no interest allowed in any event until after the termination of the litigation over the final admission of the will to probate and the necessary proceedings thereafter leading up to the decree. Should these conclusions be applied, it would be necessary to compute the interest beginning with the event named. However, we are of opinion that, under the peculiar circumstances of this case, the defendant would not be entitled to interest on the unpaid portion of the allowance fixed by the district court subsequent to the final probate of the will and the necessary proceedings thereafter in the county court, the trust estate being largely in her own hands and subject to her control. So far as we are able to ascertain from the record she presents here, she made no demand nor effort to obtain the right to the use of more of the estate than she actually appropriated to that purpose. True, she was not at fault for this, as the estate has been in constant litigation, and, until the entry of the decree by the district court, the amount to which she was entitled for her own use was unknown, and, while it was not within the power of the district court to deprive her of the allowance for the full time contemplated by law, yet it was a proper exercise of its jurisdiction to disallow the accumulation of interest. We therefore hold that the defendant is entitled to the said sum of \$5,400 annually from the date of the death of the testator, to be paid out of the income of the trust estate, less the amount received by her, but that she is not entitled to interest thereon for any portion of said time, nor is she chargeable with interest should it be found that she has received and appropriated more than the annual allowance made. In this the court did not err.

In the opinion by Judge LETTON (73 Neb. 709), it is said: "Mrs. Wharton's reasonable expenses in the litigation in which the will was established should be paid out of the whole estate taken under the will, including taxable costs and reasonable attorneys' fees. The taxable costs in this case should be adjudged against Mrs. Wharton per-

sonally, each party paying their own attorneys." It is possible that this language may have been misapprehended or misconstrued by the district court, as by the findings and decision of this court, and the second finding of the district court on the hearing now here on appeal, the property conveyed and transferred to Mrs. Wharton vested in her absolutely and unconditionally upon the conveyance and transfer, and, as said in the finding, "the said George H. Boggs did not die seized of the same." It must be apparent therefore, that in the language above quoted the writer of the opinion referred only to the estate devised and bequeathed as "the whole estate taken under the will," and that the costs and expenses therein referred to as payable out of the whole estate should be paid out of the estate thus transferred; but that such payment should not in any way deplete the amount to be paid or retained by Mrs. Wharton for her maintenance and support. Upon this part of the case the eighth finding of fact, which is too long to be here quoted, is not very clear. Among other things it is said, in substance, that the separate estate of Mrs. Wharton, acquired as the donee of the real and personal property given her after the execution of the will, and prior to the death of Mr. Boggs, and which was of about the same value as the estate transmitted by the will, received an indirect but real benefit from the services of counsel in the litigation growing out of the contest of the will. That such benefit was taken into consideration by her counsel in fixing the amount of their charges, and should be apportioned accordingly. That one-third thereof should be borne by "the estate indirectly benefited, and two-thirds thereof by the estate directly benefited"; that \$10,333.33 of the \$15,500 paid out as attorneys' fees should be charged to and paid by the trust estate, and to which should be added the sum of \$340 paid out for expenses, making a total of \$10,673.33; that the value of the trust estate, which included \$10,000 bequeathed to Mrs. Wharton, was \$135,000, \$125,000 thereof going to the trustee; that the trust estate

should therefore be charged with the payment to Mrs. Wharton of 125-135 of the \$10,673.33, being \$9,882.90. It is true, as claimed by counsel for appellees, that there is no bill of exceptions preserved by appellant to which we can refer for the evidence upon this feature of the case, but we are persuaded that enough is shown by the record and findings to justify a review of this question. As we have hereinbefore said, it is well settled by the former opinion that the reasonable expenses made in probating the will should be paid out of the estate devised and bequeathed. This must of necessity include the whole expense, since the title to the property conveyed and assigned to defendant by her husband constituted no part of the estate to be affected by the will. Her title to that property did not depend upon the validity of the will. Had probate been finally denied, the property would still have been hers. Then why should she be required to defray any of the necessary expense of that litigation out of her own estate, except in so far as she was directly interested? We fail to see any reason why she should. Instead of the trust estate paying 125-135 of two-thirds of that expense, it should pay that proportion of the whole, less the amount to be deducted on account of the \$10,000 interest she had in the bequeathed estate, in order to equitably reimburse defendant what she has reasonably and necessarily expended in that litigation. The question as to whether the \$15,840 was a reasonable and fair charge can be further investigated, if deemed necessary.

Lastly, it is insisted that the district court erred in taxing all costs to defendant. We grant that a large discretion is vested in the trial courts in the matter of the taxation of costs under section 623 of the code. But, as held in *Wallace v. Sheldon*, 56 Neb. 55, and *In re Clapham's Estate*, 73 Neb. 492, this discretion is not an arbitrary one, but a legal one, to be exercised within the limits of legal and equitable principles. It is suggested that in the opinion of the district court the statement contained in the above excerpt from the former opinion in this case

that "the taxable costs in this case should be adjudged against Mrs. Wharton personally" was intended as imposing upon her all the costs which might be made throughout the whole of the litigation, without reference to its length, or whether or not she was in the wrong. There can be no doubt but that what was in the mind of the writer of that opinion was that the costs of the case to that time, including that appeal, should be taxed to her. It would be wholly inequitable and unreasonable to say that whether she be found to be in the right or wrong, or if the litigation should be protracted wrongfully and against her wish or desire, all the costs which might be made in the future should be taxed to her, without reference to the result of the litigation. This would be giving a weapon to one side during the future continuance of the litigation, and imposing a handicap upon the other, which neither the law nor this court ever contemplated. It was impossible for either party to this action to say, prior to the decree in this case, just what amount of money defendant could legally and safely use for her maintenance and support. Any disbursement she might have offered to plaintiffs could have been rejected and made the source of almost endless litigation, for each year's apportionment would have furnished new grounds for legal contest. The rights of no one were settled until adjudicated by the court. It was as necessary for one side as the other that all ground for contention should be removed. There is no finding or decree fastening any malversation, fraud, or wrongdoing upon defendant or her husband, the present trustee. True, the court did not allow her to retain as much of the trust fund for her maintenance as she desired, but more was allowed than plaintiffs were willing to grant. In view of all the circumstances, it would seem but just that the taxable costs of the trial and this appeal be paid out of the trust estate, each party paying their own attorneys' fees. The order taxing the costs to defendant Ida M. Wharton is reversed, with directions to tax the taxable costs to the trust estate.

Smullin v. Wharton.

The judgment of the district court, in so far as the matters here discussed are concerned, is reversed, and the cause is remanded for further proceedings and decree in accordance with law and this opinion.

REVERSED.

LETTON, J., dissenting.

I am unable to take the same view of the rights of the parties in this case as that expressed in the opinion of the chief justice. In the second opinion in the case, written by HOLCOMB, C. J. (73 Neb. 705), the following language is used: "The former opinion should be accordingly modified, and the trust property held to have *vested in the collateral heirs* of the testator named in the will, *subject to the use of the net annual income* and the principal estate by the appellee, Ida M. Wharton, as the same may be reasonably necessary and required to support and maintain her in the style of living she had been accustomed to, and subject to her right to devote not exceeding \$10,000 to charity." In the body of the opinion the following expressions are used (p. 700): "It seems reasonably clear that he impounded a specific portion of his estate, the bulk of it, to be used, first, for the support of his wife, *if required*; and, second, the remainder to go to his heirs as named in the provisions of the express trust found in the will." On page 701 the following is found: "If this language be construed, as we think it should be, as applying to the property devised to Westerfield in trust, and as giving to the wife the *right to the use of the annual income* in so far as it is required to maintain her in the style and comfort she had been accustomed to, and also a like right to the original fund or property devised in trust, if so required for a like purpose, then the matter is resolved into a very simple proposition wherein lies no serious difficulty in the way of the enforcement of the trust. The \$5,000 or \$10,000 to be devoted to charity, if the wife so desires, involves only a matter of mathematical computation, the limit being \$10,000, the limit in other respects being what is required and reasonably necessary for the support of the wife in the style and

comfort in which she had been living." On page 703: "They would make clear that as to this part of the estate she had only the right of use reasonably necessary to support and maintain her as she had been accustomed to living." On page 709 in the supplementary opinion written by myself, the following language is used. "The remaining property was placed in trust with Westerfield, with the right to his wife *to use the income from it*, or if necessary the corpus thereof, for her maintenance and support during her life, in her accustomed style, or to give a part to charity, and the annual surplus income after this was done, and the property in trust remaining at her death, was to be divided among his relatives." At the close of this opinion, the district court was directed "To take an account of and ascertain what sum per annum is sufficient to support and maintain the appellee, Ida M. Wharton, using the family homestead, according to the style of living to which she was accustomed at the time of the death of the testator, and to charge the payment of the same annually during her life upon the income of the trust estate devised to Westerfield, and upon the corpus thereof if the income is insufficient, and according to the conditions of said trust." I think that these quotations from the former opinions make it perfectly clear that the intention of the court was that Mrs. Wharton should have the use of the income so far as necessary for her support, and that all that was necessary for her to do when the case went back to the district court for an accounting was to establish that she had expended a certain amount either of the income or of the corpus of the trust estate, if the income was insufficient, in her support, the only limit being that she did not exceed or go beyond the style of living to which she had been accustomed in her husband's lifetime.

While the contest of the will was pending, this income was not accessible to her, and she could take nothing from the estate except as allowed by the county court and paid to her by the special administrator. The property was not

within her control, and, hence, if upon the accounting she had shown that the allowance made her by the county court was insufficient to enable her to live according to the prescribed standard, and that she had been compelled to use her own means for that purpose, she should have been allowed from the trust estate the sum she thus supplied, with interest from the time that she furnished the money. After the will was probated and established, and Westerfield entered upon the execution of the trust as trustee, the conditions were changed. From that time on there was nothing to prevent her from using the income, and, if necessary, a part of the corpus of the estate, in order to furnish her a living in her accustomed manner. From that time on all proceeds of the trust estate were at her absolute disposal, the only limitation being as to the disposition she could make of the surplus after her own support had been taken out. If the amount which she received from the income of the trust was not sufficient to satisfy her desires, she had the right to use a portion of the principal. The whole matter was within her own discretion. She was only accountable in case she exceeded the limitations as to her use of the fund. Her husband's intentions were not that she should skimp and save and create a large estate by living in a meager style and hoarding the sum thus saved, but his expressed intention was, and the language quoted from the opinions of the court I think clearly indicates, that the only right she has or had was to the *use* of the money, and not a right to its accumulation for the benefit of her heirs or donees. This was the very thing he sought to avoid. Of course, as soon as an accounting was had, it was then within the power of the court to ascertain what the expense of a course of living such as was contemplated by her husband is now, and will be in the future, and to fix and determine that amount and charge the payment of it upon the estate. This does not change the fact that, strictly speaking, she is only entitled to use this sum of \$5,400 for the purposes designed; but though her expenditures may not in fact reach

this sum, or may exceed it, it is so approximately correct that in all probability it is as near as can be attained, and ought not to be re-examined, even if conditions change.

We are confined to the findings of the district court in regard to the facts. It found "that the sum per annum sufficient to support and maintain Ida M. Wharton, formerly Ida M. Boggs, using the family homestead, according to the style of living to which she was accustomed at the time of the death of the testator * * * is \$5,400." The court further found: "The defendant Ida M. Wharton, since the death of the testator, has not lived and is not now living in the style intended by the testator, but has lived and is living in a less expensive style than that to which she was then accustomed, and it does not appear whether the actual expenses of her maintenance exceed the amount received by her from the allowance made by the county court and the net income from the trust estate." The decree further recites: "The court holds, as a matter of law, that the defendant Ida M. Wharton is not entitled to recover from the trust estate any part of the sum of \$5,400 for any prior year, for the reason that the evidence fails to show that during any such year she actually expended for her support more than she received during the year from the trust estate." Under these findings of the district court, I think no other decree would be proper, on this branch of the case, than that which the trial judge rendered. I think the following cases tend to support these views. *Blanchard v. Chapman*, 22 Ill. App. 341; *Collister v. Fassitt*, 163 N. Y. 281; *Bailey v. Worster*, 103 Me. 170; *In re Simon's Will*, 55 Conn. 239; *Johnson v. Johnson*, 51 Ohio St. 446; *Garland v. Smith*, 164 Mo. 1.

As to the matter of the allowance for expenses in defending the will, the lower court found that \$10,673.33 was her reasonable expenses incurred in the litigation in which the will was established. I think we are concluded by this finding in the absence of a bill of exceptions, and

Smullin v. Wharton.

that we have no right to set it aside upon statements made in briefs and oral arguments.

As to the costs in the matter of the accounting in the district court, I think it proper that they be paid out of the corpus of the trust estate, since the controversy was one made in good faith as to the proper disposition of that property. I think the judgment of the district court should be affirmed, except as to this last item, as to which I concur with Judge REESE.

ROOT, J., concurs in this dissent.

The following opinion on motions to correct and for rehearing was filed May 7, 1909. *Corrections allowed. Rehearing denied:*

1. **Wills: CONSTRUCTION: ALLOWANCE TO WIDOW.** The opinion filed and judgment entered in this court, *ante*, p. 328, corrected and amended so as to allow defendant's support from the trust estate instead of from the income thereof.
2. ———: **ACTIONS: COSTS.** At the suggestion of counsel for defendant, in order to prevent further litigation, the decree of the district court in the matter of the allowance to defendant for costs, expenses and attorneys' fees is affirmed.
3. **Interest.** The former holding refusing to allow defendant interest on the annual allowance of \$5,400 for support adhered to.

PER CURIAM.

The opinion written upon the last appeal in this case is reported, *ante*, p. 328. Subsequently defendants filed a motion to correct alleged verbal errors in the opinion. The first clause in this motion seeks to correct a supposed error occurring at the close of the paragraph which discusses the allowance to defendant of \$5,400 per annum to begin at the date of the death of the testator instead of January 1, 1908, as fixed by the judgment of the district court. In the opinion it is held that the defendant is entitled to the \$5,400 annually from the date of the death of the testator, "to be paid out of the income of the trust estate, less the amount received by her," but without in-

terest. From an examination of the provisions of the will it appears that the right of defendant to her support out of the trust estate is not limited to the income, and therefore the use of the words "the income of" were inadvertently used, and it should have read, and is changed to read, "out of the trust estate," subject to a deduction of what she received from said estate during said time.

Again, objection is made to the holding, *ante*, p. 328, in which the decision of the district court is reversed on the question of the allowance of attorneys' fees paid by the defendant. It was stated by counsel for her in the argument on this motion that, rather than enter upon a re-examination of this question in the district court, and thus cause further delay in the final settlement of the estate and the further continuance of the litigation, defendant would prefer that the judgment of the district court giving her credit for \$10,000, instead of the whole amount paid, should stand. The judgment will therefore be that that part of the decree will be affirmed.

It follows that the order for the judgment of this court should be changed to read as follows: The judgment of the district court, as to the questions herein reviewed and set aside, is reversed and the cause is remanded, with directions to said court to enter a supplemental decree requiring the trustee to pay to the defendant, Ida M. Wharton, out of the trust estate, a sum equal to the sum of \$5,400, per annum, from June 1, 1895, to January 1, 1908, less such sums as have been heretofore paid to or received by her out of the trust estate, as established by the facts found and set forth in the decree of said court, and that all taxable costs of the last trial and of this appeal be taxed to the trust estate to be paid by the trustee.

Plaintiffs have filed a motion for a rehearing, which is supported by an elaborate brief which has been carefully considered. Some of the propositions contended for have already been disposed of doubtless to the satisfaction of plaintiffs. All others are found to question the correct-

Smullin v. Wharton.

ness of the former opinion. Those have received consideration, but we are satisfied with our holdings upon the points discussed. The motion is therefore overruled.

Defendants have also filed a motion for rehearing, alleging as ground therefor that this court erred in directing that a further accounting be had, since, as alleged, an accounting has already been made and all necessary facts found. The only matter now left for an accounting is as to the amount received by defendant out of the trust estate since the death of Mr. Boggs to be charged up against the \$5,400 per annum to which she is entitled. To our minds the findings of the district court are not entirely specific upon this point, but, should it be so held by that court, or should the court be able to arrive at a satisfactory conclusion from the evidence offered upon the trial, which is not before us, no accounting will be necessary; if not, it will have to be made.

The second ground of the motion is error in not allowing defendant interest at the rate of 7 per cent. on the annual allowance of \$5,400. While we adhere to the holding that the annual allowance must date from the death of the testator, we are entirely satisfied that defendant cannot, in equity, be held entitled to interest under the circumstances of this case. It would be against right and conscience to allow it.

The one other ground presented is upon the allowance to defendant of the costs and expenses in establishing the will, including her attorneys' fees paid in that behalf, and which has herein above been disposed of. Defendant's motion for rehearing is also overruled.

CORRECTIONS ALLOWED. REHEARING DENIED.

WORRALL GRAIN COMPANY, APPELLEE, v. FRANK JOHNSON,
APPELLANT.

FILED FEBRUARY 6, 1909. No. 15,449.

1. **Pleading: DEMURRER: WAIVER.** Where a party answers over after an adverse ruling on his motion or demurrer, and goes to trial on the merits of an issue he has elected to join, he waives the error, if any, in such ruling.
2. **Evidence examined, its substance stated in the opinion, and held sufficient to sustain the judgment.**
3. **Appeal: REFUSAL OF TRIAL BY JURY: HARMLESS ERROR.** It is error to refuse a request for a jury trial in an action at law, but where the one making the request has no substantial cause of action or defense, and the judgment of the trial court is the only one which could have been rendered in the case, such refusal is error without prejudice, for which the judgment will not be reversed.

APPEAL from the district court for Lancaster county:
LINCOLN FROST, JUDGE. *Affirmed.*

O. B. Polk, for appellant.

Field, Ricketts & Ricketts, contra.

BARNES, J.

Plaintiff, now the appellee, brought this action in the district court to recover of the defendants the difference between the sum advanced to them on a car-load of wheat and what was realized therefor when it was sold on the market. It appears that the grain was sold to plaintiff by defendants Johnson and Cave, through their agent, defendant Hempel, as No. 2 hard wheat, and defendants, when the grain was loaded at the point of shipment, drew a sight draft on the plaintiff (which was duly paid) for a sum equal to 90 per cent. of the purchase and market price for that grade of wheat. When the grain reached Minneapolis, which was its place of destination, it was found to be wet and badly heated, so that it was not up to any grade whatever, and could not be sold on that mar-

ket. It was immediately billed to Chicago, where it was sold at the highest price obtainable, and brought net \$322.60 less than the sum advanced thereon. It also appears that the plaintiff was not certain as to whether Hempel was the principal in the transaction or whether he was merely the agent of the defendants Johnson and Cave, who, it developed later, were in fact his undisclosed principals.

The plaintiff therefore by its petition set forth all of the foregoing facts, and alleged that the wheat delivered to it by the defendant Johnson was wet and damaged and not up to grade when delivered and loaded into the car by him, and that he well knew its quality and condition. The petition further set forth the amount of wheat delivered by Johnson, the amount delivered by Cave, and prayed for an accounting and adjustment of the rights of the several defendants, a judgment for the sum of \$322.60, with interest thereon from the 28th day of August, 1905, and "for such other and further relief as may be just and equitable."

The defendants answered separately. The answer of defendant Johnson, who is the sole appellant, was: First, misjoinder of parties defendant; second, misjoinder of causes of action; third, no equity in the plaintiff's bill; fourth, an admission that plaintiff is a corporation, and a denial of all of the other allegations of the petition. Defendant Johnson also filed a motion praying that the case be transferred from the equity docket to the law docket of the district court, which motion was overruled; and when the case came on for hearing he demanded a trial by jury, for the reason that the action was one at law, and not in equity. His request was denied, to which he duly excepted. A trial resulted in a finding and judgment for the plaintiff, and against the defendant Johnson, for the sum of \$257.50, and he has brought the case here by appeal.

Defendant now assigns as error certain rulings of the district court, to wit, overruling his motion to require the

plaintiff to elect whether it would proceed against him or the defendant Hempel, and overruling his demurrer to the plaintiff's petition. In disposing of these questions, it is sufficient to say that by answering over after the rulings complained of he waived his exceptions thereto, and they cannot now be considered. In *Becker v. Simmonds*, 33 Neb. 680, it was held that, where a party answers over and goes to trial on the merits of an issue which he has elected to join, he waives the error on the overruling of motion or demurrer. To the same effect are *Buck & Greenwood v. Reed*, 27 Neb. 67; *Pottinger v. Garrison*, 3 Neb. 221; *Lederer v. Union Savings Bank*, 52 Neb. 133, and *Dorrington v. Minnick*, 15 Neb. 397.

Defendant also contends that the evidence is insufficient to sustain the findings and judgment of the district court. His principal reason for this contention is his assumption that this action was based on a breach of warranty that the wheat in question should grade No. 2 on the Omaha market, and proof that it did not so grade at Minneapolis is not sufficient to establish a breach of that warranty. It appears, however, from both the pleadings and the evidence, that the plaintiff agreed to purchase, and the defendant agreed to sell, a car-load of No. 2 hard wheat, to be shipped to the Minneapolis market at the agreed price of 74½ cents a bushel; that the wheat delivered in the car by the defendant Johnson was wet and damaged; that it was not of the grade and quality agreed upon, and was in fact in such a condition that when it reached its destination it was not up to the standard of any grade at all, and that plaintiff had no opportunity to examine or inspect the wheat until it was received in Minneapolis. Under these circumstances, plaintiff was entitled to recover of defendant the difference between the price paid and the highest price the wheat would bring in the market where it could be sold. An examination of the plaintiff's evidence, which is in no way questioned or disputed, satisfies us of its sufficiency to sustain the judgment.

Worrall Grain Co. v. Johnson.

Finally, it is contended that this is not an equitable action, and the court erred in overruling defendant's motion to transfer it to the law docket, and in refusing a jury trial. We are of opinion that these contentions are well founded. The action was one for the recovery of money only, and, while the petition prayed for equitable relief, the facts alleged and proved do not require or authorize such relief. It therefore remains for us to ascertain whether the errors thus committed were at all prejudicial to the rights of the appellant. The record discloses that no evidence was introduced by him at the trial, and in fact he made no attempt to defend against the case made by the plaintiff. We are therefore of opinion that at the close of the evidence, had a jury been impaneled, the judge of the district court would have been required to direct a verdict for the plaintiff. We have examined the evidence and find that the amount of recovery is not excessive. In fact no other or different judgment could have been rendered in this case. It follows that the refusal to grant the appellant a jury trial resulted in no prejudice to any of his substantial rights, and therefore does not call for a reversal of the judgment complained of. *Chamberlain v. Brown*, 25 Neb. 434; *Degering v. Flick*, 14 Neb. 448; *Pollard v. Turner*, 22 Neb. 366; *Gage County v. King Bridge Co.*, 58 Neb. 827.

For the foregoing reasons, the judgment of the district court is

AFFIRMED.

FAWCETT, J., not sitting.

ORD HARDWARE COMPANY, APPELLEE, v. J. I. CASE THRESHING MACHINE COMPANY, APPELLANT.

FILED FEBRUARY 6, 1909. No. 15,484.

1. **Appeal: INSTRUCTIONS.** It is reversible error to instruct a jury on an issue not sufficiently raised by the pleadings, and which is unsupported by the evidence, where it is apparent that such instruction has resulted in an excessive verdict.
2. **Principal and Agent: ACTION FOR COMMISSIONS: CONTRACT: CONSTRUCTION.** Where, in an action by an agent against his principal to recover money alleged to be due on commissions, it clearly appears that the parties have adopted a fair and reasonable construction of their contract and have acted thereon for a number of years, the court will also adopt such construction.
3. **Appeal: JUDGMENT: REMITTITUR.** Where the adoption of such construction results in reducing the question of the amount of plaintiff's recovery to a mere matter of computation, this court may make such computation, and require plaintiff to file a remittitur of the excess of the judgment rendered in the trial court over the amount he was entitled to recover, or submit to a reversal of his judgment.

APPEAL from the district court for Valley county:
JAMES R. HANNA, JUDGE. *Remittitur ordered.*

O. A. Abbott and H. E. Oleson, for appellant.

A. M. Robbins, contra.

BARNES, J.

This action was brought by the Ord Hardware Company against the J. I. Case Threshing Machine Company in the district court for Valley county to recover the sum of \$591.25 alleged to be due the plaintiff as commissions for selling a threshing outfit. The plaintiff had a verdict and judgment in the court below, and the defendant has brought the case here by appeal.

It appears from the pleadings and the evidence that the plaintiff was the agent of the defendant company

under a written contract of agency, which had been renewed from year to year for a period of something like seven years; that on or about the 14th day of July, 1899, the plaintiff as such agent sold the threshing outfit in question to Coon and Anderson, residents of said county, for the agreed price of \$2,260, which was evidenced by certain notes, as follows: "\$365 due Dec. 1st, 1899; \$400 due Jan. 1st, 1900; \$365 due Dec. 1st, 1900; \$400 due Jan. 1st, 1901; \$350 due Dec. 1st, 1901; and \$380 due Jan. 1st, 1902." The payment of the first two notes was guaranteed by the plaintiff, and the remainder of the purchase price was secured by a chattel mortgage on the property sold. That part of the written contract of agency relating to commissions was as follows: "But it is understood that no commission is earned or payable where from any cause a machine shall be returned by the purchaser, or is taken by the company in settlement of any note or notes, or part thereof given therefor, or is bid in by the company upon sale on execution, attachment or foreclosure. A nonnegotiable commission certificate or equivalent instrument shall be issued by the company representing the commission to accrue upon each such instalment, payable upon full payment in money of the note or instalment represented by such certificate * * * reserving the right to the company to renew, extend or compromise all notes at its discretion." This contract was modified as to the sale in question by the following letters: "Lincoln, Neb., July 15th, 1899. Ord Hardware Company, Ord, Neb. Gentlemen: I have yours, also the Coon *et al.*, as sent in by our Mr. McFarland. We do not wish to accept this order in this way. But if you will accept your commission proportionately on the last four notes, on the payments due in 1900, and give us this year's payment without commission we will accept the order and ship the goods immediately. What we mean by this is not to reduce the amount of your commission, but that you accept them proportionately on the 1900 and 1901 payment. If this is satisfactory to you and you wish this rig shipped

immediately please wire us, and the rig will go forward at once. Awaiting your reply, we remain yours very respectfully, J. I. Case, T. M. Co., E. F. Gittings." "Ord, Neb., 7-25-99. J. I. Case, T. M. Co., Lincoln, Neb. Gentlemen: Please change the Coon and Anderson rig to a 36-in. cylinder 58 rear instead of the small separator 32 by 54, and be ready to send out in about eight or ten days, for they came in today and told us to let it come about that time, and we may have something to load with it about that time, and we will settle by your letter of July 15th, '99, taking our commission out of the 1900 and 1901 notes. They don't want the rig for about ten days, so we may want to ship something else with it. Yours resp., Ord Hardware Co., by A. J. Firkins, mgr."

The sale was made on those terms, and shortly thereafter the defendant furnished the plaintiff with four commission certificates, as follows: \$111.60 on note due Dec. 1, 1900; \$122.40 on note due Jan. 1, 1901; \$107 on note due Dec. 1, 1901; \$106.50 on note due Jan. 1, 1902. These certificates were accepted and retained by the plaintiff, and no complaint appears to have been made or objection raised to them until the commencement of this action. It also appears that they refused to surrender them when, later on, and some time in the year 1903, the defendant, being unable to collect the amount still due for the threshing outfit, took back the machine and surrendered up the unpaid notes. It further appears that the two notes guaranteed by the plaintiff, due December 1, 1899, and January 1, 1900, and against which no commission certificates were issued, were paid after considerable delay, and that long after the third note became due there was paid thereon the sum of \$163.36; that the matter remained in that condition until in July, 1903, when the final settlement was made, and the outfit was returned to the defendant, there was paid by Coon and Anderson a further sum of \$350, which fully paid the first three notes in question. The amended petition set out the agency, the contract for commissions, the letters above quoted, the

payments made, the settlement which was concluded between Coon, Anderson and the defendant, alleged that it was thereby made impossible to collect the remainder of the notes, and claimed a judgment for full commissions, which it was alleged amounted to \$591.25, together with interest thereon.

The answer of the defendant set out the sale of the machinery, the notes given therefor, the commission certificates that were issued and delivered to the plaintiff; alleged that the plaintiff had kept and refused to surrender them; had demanded payment on them, and denied that any other or different commission was due, alleged that no commission was ever demanded on the first two notes, and that by the words contained in the letter, "This year's payments," the parties understood payments for the current year, and not the calendar year, alleged the payment of the first two notes, and the payment of the \$163.76 on the third note, and no more, alleged the surrender of the property and the payment of \$350 in settlement; that the property was much depreciated by use; that the balance due was much augmented by interest, and that the settlement was made in good faith and to prevent further loss to the defendant. The pleadings also contained some matters relating to alleged imperfections in the machinery, and threatened litigation. The defendant specially denied that the settlement in question was made in order to cheat or defraud the plaintiff. The reply admitted the dates and amount of notes, denied all other allegations contained in the answer, and alleged that the settlement or repurchase of the machinery was in part settlement of the damages sustained by the purchasers, and for the purpose of cheating and defrauding plaintiff out of its commission.

There is no serious disagreement between the parties or conflict of evidence as to the principal facts involved in this case. It is disclosed by the evidence that some complaints were made by Coon and Anderson about the machinery; that the defendant replaced such parts as were

complained about; that Coon and Anderson used the machine at least three years; that none of the notes were paid promptly when they became due, but were paid in instalments from time to time, and after much urging, and that at the time of the settlement the purchasers refused to make any further payments, and that the payment of \$350 made at that time was for the purpose of avoiding litigation and closing up a losing transaction; that it was accepted by the defendant, together with the machinery in its damaged and worn out condition, and that the remainder of the notes were canceled and delivered up to the makers.

With the record and the evidence in this condition, the trial court instructed the jury, at the request of the plaintiff, as follows: "The jury are instructed that where two persons enter into a contract, the one to furnish articles and the other to sell them on commission, and receive his commission when the notes taken for the articles are paid for, the person furnishing the goods cannot retain or reserve the right in said contract to defraud the person acting as agent, nor reserve or retain the right to do any act or thing which will operate as a fraud upon the seller on commission. If the seller or agent sells goods and takes good paper, which is collectible at law, or which is well and amply secured, the seller or principal cannot so interfere with the customer of the seller so that the effect of said interference, or that the effect of such transaction, is necessarily fraudulent toward the agent and seller of goods on commission, which act would deprive him of the commission to which he was lawfully entitled, and which act was not necessarily done in order to protect the principal, then the seller or agent of the goods would have a right to demand of the principal the whole amount of the commission, notwithstanding the fact that the principal might seek to reserve in the contract those rights which would, if exercised, result in such fraud upon the seller and agent."

The giving of this instruction was duly excepted to by

the defendant, and is now assigned as reversible error. While it is true that parties cannot lawfully agree to commit a fraud, and the instruction as an abstract proposition of law may be correct, we are of opinion that it has no application to the facts of this case. The pleadings do not fairly raise an issue of fraud, and there is no competent evidence in the record tending to establish that issue. The evidence clearly shows that the contract was made in good faith, and was well understood by both parties. By the construction which they had given the contract for many years the selling price of the machinery was determined by adding to the list price the amount of commissions agreed upon, and the sum thus obtained was what the customer was required to pay. When time was given to the purchaser each note taken in payment carried its share of the total commission, and whenever it was paid in full the agent was entitled to so much of his commission as was included therein. In case the machine was returned or was taken back, the agent was not entitled to any commission on the unpaid portion of the purchase price. It is true that this contract was modified or changed by the agreement contained in the letters above quoted so as to postpone or transfer the payment of the commission to the last four notes, but, when the machine was taken back by the defendant and those notes were surrendered, the agreement contained in the letters was necessarily abrogated, and the plaintiff was entitled to recover so much of the commission as should have been included in the first two notes, which had been paid in full. As to the third note for \$350, on which there had been paid at that time the sum of \$163.36, so much of the \$350 paid to the defendant at the time of settlement as was necessary to pay that note in full should have been applied to that purpose (*Belcher v. Case Threshing Machine Co.*, 78 Neb. 798), and the plaintiff would then have been entitled to receive the amount of the commission contained therein. This is a fair construction of the contract, and is the one previously adopted by the parties

themselves. The jury, therefore, would have been authorized to return a verdict for the plaintiff for the sum of \$223.75, with interest thereon from the 13th of July, 1903, at the rate of 7 per cent. per annum, and no more. Notwithstanding this fact, the verdict was for \$448.80, for which final judgment was rendered. We therefore conclude that the giving of this instruction was reversible error.

It is conceded by the defendant, however, that the plaintiff was entitled to recover \$143.15, so in any event it should have had a verdict. As we view the record, there is really no dispute as to any relevant fact contained therein, and the whole question should be treated and disposed of as one of law. Giving the contract the construction placed upon it by the parties themselves, the amount which the plaintiff was entitled to recover was a mere matter of computation, and was such part of the whole commission agreed upon as the amount of the fully paid notes bear to the selling price of the threshing outfit. The price agreed to be paid by the purchaser was \$2,260; the amount paid to take up the first three notes was \$1,130, or one-half of the selling price; the amount of the commissions agreed upon was \$447.50, and plaintiff was therefore entitled to receive one-half of that sum, or \$223.75. This was payable when the settlement was concluded, and the plaintiff should have interest thereon from that date to the time of the trial at the rate of 7 per cent. per annum. The verdict should have been for \$287.05, and a new trial would probably result in such a verdict. We think, however, the case should be disposed of without further litigation or expense, and it is therefore considered that, in case the plaintiff files a remittitur of all of the judgment rendered in the court below, except \$287.05, within 40 days from the filing of this opinion, the judgment of the district court will be affirmed. But, if a remittitur is not so filed, the judgment is re-

Whitcomb v. Chase.

versed and the cause remanded for further proceedings.

JUDGMENT ACCORDINGLY.

REESE, C. J., not sitting.

WALDO E. WHITCOMB, APPELLANT, v. HIRAM CHASE,
APPELLEE.

FILED FEBRUARY 6, 1909. No 15,505.

1. **Elections: APPEAL: TRANSCRIPT: AUTHENTICATION: WAIVER.** To properly perfect an appeal from the county court to the district court in an election contest, the filing of a duly authenticated transcript is required. But if the transcript filed is not duly authenticated, yet no objection thereto is made by the appellee, and the parties treat it as sufficient and try the case on its merits, the jurisdiction of the district court cannot be questioned for the first time on appeal to this court.
2. ———: **CHANGE OF POLLING PLACE.** It is the general rule that an election should be held at the place designated in the election notice. But, where the board cannot procure the place so designated for the purpose of holding the election, they may, in such emergency, change the polling place to another suitable, convenient, and proper location, giving due notice of that fact; and, unless it appears that a sufficient number of the electors to change the result of the election were deprived of an opportunity to cast their votes by reason of such change, and where it affirmatively appears that the election was fairly and honestly conducted, and that the result would have been the same had it been held at the place designated in the notice, such change will not render the election void.

APPEAL from the district court for Thurston county:
ABRAHAM L. SUTTON, JUDGE. *Affirmed.*

Howard Saxton, Thomas L. Sloan, Curtis L. Day, J. H. Van Dusen, L. J. Te Poel and Waldo E. Whitcomb, for appellant.

Hiram Chase and R. E. Evans, contra.

BARNES, J.

Waldo E. Whitcomb and Hiram Chase were rival candidates for the office of county attorney of Thurston county at the general election held in November, 1906. Chase was declared elected, and has served out his term. Whitcomb contested his election by proceedings instituted in due time in the county court, where he had judgment. Chase appealed to the district court, where, after a protracted trial, the judgment of the county court was reversed, and his election was confirmed. Whitcomb thereupon appealed to this court, and asks for a reversal of that judgment. For convenience he will be called the plaintiff, and Chase will hereafter be called the defendant.

The plaintiff contends that the district court never obtained jurisdiction of the case, and its judgment is therefore void. It appears that the transcript from the county court, as copied by the clerk of the district court, is without a certificate, or, in other words, is not duly authenticated, and it is claimed that the district court never obtained jurisdiction of the case. The defendant has brought here a certified copy of what he alleges to be the last page of the transcript of the judgment of the county court which contains a proper certificate, and alleges that the same was a part of his transcript when it was filed in the district court, and that it has in some way become detached therefrom and asks leave to file it as a part of the transcript in this court. To this the plaintiff strenuously objects. In our view of the matter, it is unnecessary for us to determine this question. It appears that plaintiff made no objection to the jurisdiction of the district court; that both parties treated the case as though the appeal was properly perfected, and no suggestion was made, or appears in the record, that the transcript of the judgment of the county court was not properly certified at the time it was filed, and when the trial in the district court took place. Therefore the plaintiff is not in a position at this time to object to the jurisdiction of that

court. A like question was before us in *Coleman v. Spearman, Snodgrass & Co.*, 68 Neb. 28, where it is said: "Although the filing of a duly authenticated transcript is required in order to perfect an appeal from the county court to the district court, and although the transcript filed for such purpose is not thus authenticated, yet, if the parties proceed in the district court on the theory that the appeal has been perfected, they will not be heard to question the sufficiency of such transcript in this court." Plaintiff strenuously contends that this rule should not be applied to the case at bar. It is argued that the district court has no original jurisdiction in cases of this kind; that it only obtains jurisdiction by appeal, and if the appeal is not properly perfected that court has no jurisdiction. In support of this proposition many cases are cited which hold that jurisdiction of the subject matter of an action cannot be conferred by consent. That this is the well-established rule cannot now be questioned; but we are of opinion that it has no application to the facts of this case. Our statutes relating to the contest of elections provide for an appeal from the judgment of the county court, and declare that the proceedings shall be assimilated to those in an action as far as practicable. The district court having been given appellate jurisdiction of the subject matter of such contests, mistakes and irregularities in perfecting an appeal will not deprive it of such jurisdiction. Defects and irregularities in perfecting an appeal may be waived by the parties, and failure to make seasonable objection to the jurisdiction of the district court will constitute a waiver. In such case an objection to the jurisdiction made for the first time in this court comes too late, and will not be considered. We are therefore of opinion that the district court had jurisdiction of the subject matter and the parties, and had power to pronounce the judgment complained of.

This brings us to the consideration of the merits of this controversy. It appears that plaintiff's ground of contest is based on the removal of the polling place in Omaha

precinct, which had been designated in the notice of election as the "Lamson or Quinton schoolhouse," to the village of Walthill in said precinct. And it is alleged that by such removal a large number of electors who would have voted for the plaintiff but for such removal were deprived of their right to vote, and that a sufficient number of voters were deprived of that right to change the result of the election.

The testimony discloses that during the two years previous to the general election in question there had grown up in that precinct a thriving village called Walthill, which is located about three miles from the Lamson or Quinton schoolhouse; that the village was the most convenient place for holding the election, and a change of the polling place to that village would best accommodate a great majority of the electors residing in that precinct. When it was ascertained that the notice of the election designated the schoolhouse above named as the polling place for that precinct, it caused much dissatisfaction and the electors sought to make suitable arrangements for the removal of the voting place to the above named village. To that end the members of the election board went to the county seat and advised with the plaintiff, who was then the county attorney of Thurston county, as to what method should be adopted in order to effect such removal. It seems that it was agreed that, in case the schoolhouse could not be obtained for election purposes, that fact would create such an emergency as would authorize the board to procure another polling place and enable them to thus designate Walthill as the place where the election should be held. It further appears that on the morning of election day, and before it was time to open the polls, the election board met at the schoolhouse, took the oath of office, and ascertained from one of their number, who was also one of the directors of the school district, that the schoolhouse could not be used for election purposes. They thereupon ordered that the election should be held in the village of Walthill, gave notice to

Whitecomb v. Chase.

all persons present of that fact, and posted a suitable notice of the change of place of election upon the schoolhouse door. They thereupon repaired to Walthill, where the election was held in all other respects in due conformity to law.

The plaintiff on the trial produced several witnesses who testified that but for the change of the place of election they would have voted, and, if they had voted, they would have voted for him for the office of county attorney, and that they did not vote at said election. It appears, however, from the cross-examination of those witnesses that they were members of a threshing crew who were working that day for a man by the name of Phillips, at a place about equidistant from the schoolhouse and the village of Walthill; that they knew of the change of the place of election and discussed that matter as early as 2 o'clock in the afternoon of election day; that they were anxious to finish their threshing and those who worked at and about the machine concluded that they would not attend the election for that reason and not for the reason that the voting place had been changed. It further appears that some of the persons engaged in hauling the grain away from the machine did go to Walthill and cast their votes for the plaintiff; that none of the crew were prevented, by reason of the removal of the place of election, from voting if they had desired to do so. There is some evidence in the record tending to show that one person, an Indian, called Little Soldier, came to the schoolhouse and went away again; that he afterwards went to Walthill; that he did not vote, but it is doubtful if it can be said that he went to the schoolhouse for the purpose of exercising his right of franchise.

It further appears that all of the members of the election board who took part in the transaction belonged to the political party with which the plaintiff affiliates, and that all of them voted for him at said election; that the defendant took no part in procuring the change and was not aware that such change had been made until long

after the election. So it may be said that it affirmatively appears that the change was made in good faith and without fraud, and without any intention, or purpose to injure the plaintiff or deprive him of the vote of any elector of Omaha precinct. It is the contention of the plaintiff however, that this is immaterial, and that the mere fact that the election was not held at the place designated in the notice renders it void as to that precinct. It appears that the defendant had a majority of 6 votes in the whole county, and a majority of 19 votes in Omaha precinct. Of course, if the whole of this precinct was rejected, it would result in plaintiff's election. As to whether the whole vote of this precinct should be rejected we find the authorities are divided; some holding that the mere change of the place of voting renders the election void, while it is declared by others that, unless it is shown that the change was fraudulently made or resulted in the loss of votes to the plaintiff, the electors of the precinct should not be disfranchised and the election declared void. It is unnecessary for us to review these conflicting authorities for we are satisfied that we are committed to the rule that, if an irregularity, of which complaint is made, is shown to have deprived no legal voter of his right or admitted a disqualified person to vote if it cast no uncertainty on the result and has not been occasioned by the agency of a party seeking to derive a benefit from it, it may well be overlooked, and that such irregularity will not render the election void. *Baltes v. Farmers Irrigation District*, 60 Neb. 310. This rule is also supported by *Piatt v. People*, 29 Ill. 54; *DeBerry v. Nicholson*, 102 N. Car. 465; *Seymour v. City of Tacoma*, 6 Wash. 427; *Cleland v. Porter*, 74 Ill. 76, and *Fry v. Booth*, 19 Ohio St. 25.

It is urged by the defendant that the plaintiff is estopped to question the validity of the election because of his advice to the election board and his apparent participation in their act of changing the place of election. We deem it unnecessary to determine this question, and

Shelley v. Tuckerman.

we are not prepared to say that, if the change had actually deprived any considerable number of the electors of their right to vote or had in fact been the means of changing the result of the election, the contestant could not take advantage of that fact; but such is not the case. The election was fairly conducted, no one was deprived of his right to vote if he desired to exercise that right, and there is no competent evidence in the record that the result would have been at all different had the election been held at the place designated in the election notice.

For the foregoing reasons, we think the judgment of the district court was right, and it is

AFFIRMED.

CHARLES G. SHELLEY, APPELLANT, V. GEORGE P. TUCKERMAN ET AL., APPELLEES.

FILED FEBRUARY 6, 1909. No. 15,445.

Landlord and Tenant: LIEN ON CROPS: SALE: BONA FIDE PURCHASER.

In an action in equity by a landlord to establish a lien by contract upon the proceeds of the sale by the tenant of certain crops in the hands of a grain dealer, evidence examined, and *held* to sustain the finding of the trial court that the buyer paid the purchase money to the tenant without notice of the plaintiff's claim.

APPEAL from the district court for Lancaster county:
LINCOLN FROST, JUDGE. *Affirmed.*

Tibbets & Anderson, E. P. Holmes and G. L. DeLacy,
for appellant.

Burkett, Wilson & Brown and Hall, Woods & Pound,
contra.

LETTON, J.

This is an action in equity brought by the plaintiff against the defendants Tuckerman to recover rent for a

certain tract of land leased to them by the plaintiff, and against the defendants Barber & Sons to enforce a lien on the proceeds of the sale of the crop produced upon the land. By the terms of the lease between Shelley and Tuckerman the tenants agreed to give a chattel mortgage upon the crop not later than June 15 of each year to secure the payment of the rent for that year. As to the defendants Barber & Sons, it is charged that they are grain dealers, and that in 1905 they purchased from the Tuckermans a portion of the crops from the farm, with full notice and knowledge of the terms of the contract affecting the property, and that they refused to pay the plaintiff the proceeds of the sale. Trial was had, and judgment rendered against the Tuckermans for the amount of the rent; but the court found specifically in favor of the defendants Barber & Sons, and found that immediately after the purchase and delivery of the grain to them, and without notice of the claim of plaintiff, they paid over the purchase money to the other defendants. The cause was dismissed as to the defendants Barber & Sons. From that portion of the decree dismissing the case as to the Barbers, plaintiff appeals.

The sole contention of the plaintiff is that the judgment is not sustained by the evidence. The only point in dispute between the parties is as to whether or not Barber & Sons had notice of the nature and extent of the claim of lien made by the plaintiff upon the crop. In the case of *Sporer v. McDermott*, 69 Neb. 533, it was held by a divided court that an agreement to execute, after they are growing, a mortgage upon crops may be enforced specifically in equity if the circumstances so justify, and that it is no objection to such an agreement that the crops referred to were not in being when it was made. In that case it appeared that one defendant sold the crop to the other with the fraudulent purpose of defeating the lien, and not in good faith, and that the buyer before the purchase knew of the seller's fraudulent intention and purpose, and knew that the plaintiff claimed a lien on

Shelley v. Tuckerman.

the crop for the rental of the land. In this case there is no contention made that there was any fraudulent purpose upon the part of the buyers, but their liability is predicated upon the assertion that the plaintiff through his agent, Theodore Stanisics, before the purchase gave them full notice of all the facts and of the provisions of the lease. It is claimed this was done in conversations with Mr. Ernest Barber, a member of the firm of Barber & Sons.

Mr. Stanisics, the plaintiff's agent, testifies that on the 15th of June, 1904, after Tuckerman had refused through his attorney, E. W. Brown, to execute a chattel mortgage, he went to Barber & Sons; that he saw Ernest Barber, and showed him the papers he had asked to have signed and told him the circumstances. That the year before, when he leased the place to Tuckerman, he told him that the lease called for giving a mortgage of \$1,500 on all the crops, that "we had a lease, and we expected them to see that we got our money; that we had really a chattel mortgage; that the lease was virtually a chattel mortgage on all the crops raised"; that he did not see him again after that until the next year; that after June 15, 1904, he had several conversations with Barber asking for a settlement; that in one of these talks Barber stated that if there was any controversy he would keep the money until settlement, and that this conversation was after the crop was delivered. On cross-examination he testifies that, although the lease was for the year 1903, as well as 1904, and the grain was sold to Barber & Sons in 1903, yet Barber never paid him any money for grain under the lease of that year; that the note was paid to him directly by Mr. Brown for the Tuckermans. He further testifies that after the 1904 corn was sold Mr. Barber told him he would turn the money over to Wilson & Brown, the attorneys, who had said they would protect him. Mr. A. S. Tibbets, one of the plaintiff's attorneys, testified that before the suit was begun he went to the place of business of Barber & Sons, and saw one of the younger members

of the firm, who stated to him that Stanisics and the Tuckermans had got into a controversy as to whom the money belonged; that they had held it for some time, but had finally turned it over to Wilson & Brown, under the assurance from Wilson & Brown that Shelley had no lien upon the crops, and that the lease was simply one that provided for a lien in the future, and that you could not mortgage crops in the future.

For the defendants Mr. Ernest Barber testified that he bought the 1904 corn and paid Tuckermans \$1,075.10 for it; that he had never seen any lease between Shelley and the Tuckermans; that prior to the time he bought the corn he had a few conversations with Stanisics, and that Stanisics asked him in a friendly way to help him collect his rent out there. He asked him to hold the money, and told him that he thought they would try to beat him out of his rent, and appealed to him on the ground that he had sold Barber lots of grain; that he had no knowledge that Stanisics claimed a lien upon the corn by virtue of a provision in the lease until after the money was paid, and that he, Barber, never had a clear idea about the Stanisics' claim until he talked to Judge Tibbets about it. As to this he says that Tibbets explained to him the nature of the claim, and referred him to a case, and asked him to pay the money in order to avoid a lawsuit, and that this was the first time that he had definite notice so that he understood the claim. He testifies that he did not know the grain had been delivered to his elevator at Denton until Mr. Brown, Tuckermans' attorney, called him up over the telephone and demanded the money, and stated that Stanisics or Shelley had no legal claim on the money in question, and that he then notified the agent at Denton to pay the check. He further denies that he had any conversation with Stanisics after the corn was delivered and before he paid the money. He says that he has no recollection of any conversation with Stanisics such as he describes on June 15, and never saw the papers he

speaks of, and never heard of any such agreement to make a mortgage until after the purchase and payment of the money. On cross-examination he says that he knew that Stanisics was claiming that the money was to go to him, but that he did not make any statement as to his legal rights; that he would not have paid the money over if he had known that Stanisics claimed to have a lien either in the form of a chattel mortgage or in the form of an agreement in the lease to give a chattel mortgage. He denies that Stanisics stated that he based his claim upon any chattel mortgage or an agreement under a chattel mortgage, and says he claimed he was entitled to the amount because the men were on his farm, and he wanted to collect his rent, and wanted Barber to help him. On recross-examination he testifies that he cannot remember of Stanisics telling him that he had a lease and of the provisions of the lease, and to the best of his belief he did not do so.

It is incumbent upon the plaintiff to establish that when the defendants Barber & Sons bought the crop they had such notice and knowledge of the lien claimed by the plaintiff as to place them in the same position as the Tuckermans with respect thereto. The plaintiff's claim rests almost entirely on the testimony of Mr. Stanisics. The main points are denied by Mr. Barber. While the testimony of Mr. Barber is not as positive and direct as it might have been, yet, not having the witness before us, it is impossible to tell what weight and effect as regards his credibility should be given to his manner of answering the questions. Experience has taught the writer that whether an answer is positive, direct and unequivocal, or not, often depends upon the temperament and mental habits of the witness. Some individuals will make a positive affirmation or denial, where another equally truthful, or perhaps more worthy of belief, will give his testimony in a halting and hesitating manner, and perhaps will not seem to be sure of anything, yet the testimony of the careful, cautious and hesitating witness

will, as a matter of fact, often be entitled to more weight than that given by a more positive, direct and self-confident one. It is clear that Barber knew that Stanisics expected the rent to be paid from the sale of the crop, but this is what the landlord usually expects. Knowing the imperfections of memory as to the exact words of conversation, we are disposed to adopt the view of the trial court as to the explanation by Mr. Barber of his talk with Judge Tibbets. In fact, there is but little difference in their recollection, except that Tibbets says that in the talk it appeared to him that Barber knew of the lease provisions previously, while Barber swears he never knew the facts until he learned them from Tibbets in this conversation.

Upon the whole question as to whether or not the buyers had such notice or knowledge of the rights of the plaintiff as to charge them equally with the Tuckermans, we believe the trial court, perhaps knowing the parties, and with the great advantage that actual presence of the witness gives, had a much better opportunity of forming a correct judgment as to their respective credibility than we have, and we think his conclusions are entitled to consideration. We are satisfied from the whole record that the complaint of appellant that the findings of the trial court are not sustained by the evidence is not well founded, and we are of opinion that this court would not be justified in reversing his findings upon that point.

For these reasons the judgment of the district court is

AFFIRMED.

STATE OF NEBRASKA V. WILLIAM T. DUDGEON.

FILED FEBRUARY 6, 1909. No. 15,772.

1. **Criminal Law: POLICE COURTS: JURISDICTION.** The police judge of the city of Lincoln has jurisdiction in cases of violations of the rules of the excise board of that city.
2. ———: **POLICE JUDGE: EXAMINING MAGISTRATE.** The jurisdiction of

State v. Dudgeon.

a police judge under section 18, art. VI, of the constitution, section 260 of the criminal code, and section 7943, Ann. St. 1907, in relation to misdemeanors, is concurrent with that of a justice of the peace, and, where the punishment may be a fine of over \$100, he can only sit as an examining magistrate.

3. **Intoxicating Liquors: EXCISE BOARD: POWERS.** In so far as rule 27 of the excise board of the city of Lincoln authorizes a fine of over \$200 for a violation of the excise rules, it is beyond the power conferred by the legislature and is void, but to that extent the penalty may be enforced.
4. **Rules of the excise board within its authority, duly adopted and published, are of like force and effect as ordinances of the city adopted by the city council.**

ERROR to the district court for Lancaster county: ALBERT J. CORNISH, JUDGE. *State's exceptions overruled.*

J. M. Stewart, F. M. Tyrrell and T. F. A. Williams,
for plaintiff in error.

Greene & Greene, contra.

LETTON, J.

William T. Dudgeon was charged before the police judge of the city of Lincoln with unlawfully keeping spirituous and vinous liquors for the purpose of sale without license, in violation of the rules and ordinances of the excise board of that city. A search warrant was issued, certain liquors were found in his possession, and the defendant arrested, brought before the magistrate, tried and found guilty. He appealed to the district court, and there filed a plea in abatement, which was sustained by that court, and the defendant discharged. From the judgment of the court sustaining the plea in abatement, the state has prosecuted error to this court.

The plea in abatement was based upon the propositions that the police judge had no jurisdiction of the subject because the excise board alone has this power; that the police judge had no jurisdiction to try and determine, but only to examine into the matter charged in the complaint

as an examining magistrate, as in cases of felony; that the excise board of the city of Lincoln was without power or authority to declare the acts described in rules 27 and 28 an offense or to punish the commission of them, and that said rules are in conflict with the statutes and with the constitution of the state; and that the rules under which the prosecution was had were not passed or published as required by law.

The argument in support of the first proposition is that section 64, art. I, ch. 13, Comp. St. 1907, known as the "Lincoln Charter" makes the excise board a judicial body having power to issue subpoenas and commitments to hear testimony to punish violation of its rules, and generally to have such powers as a justice of the peace has on an examination before him, and that this power is conferred upon the excise board alone, and not upon the police judge, and hence that it is the proper tribunal to try offenses of this nature. We think this is a misapprehension of the purport of the provisions referred to. When the board is in session as a licensing body or in the proper exercise of its functions in the management and control of the police force, it might be shorn of much of its usefulness if it had no power to compel the attendance of witnesses or compel them to testify, or if its presiding member had no power to administer oaths. The excise board is not a police court, and it has no power of jurisdiction to try persons charged with offenses under the criminal laws of the state or with the violation of ordinances.

It is next contended that section 260 of the criminal code gives police judges jurisdiction equal to that of a justice of the peace in all matters relating to the enforcement of the criminal laws of the state, and that section 44, art. I, ch. 13, Comp. St. 1907, gives them exclusive jurisdiction over all offenses against the ordinances of the city, but that there is no provision giving police judges jurisdiction over a violation of the rules of the excise board, and that the constitution of the state limits the

jurisdiction of a justice of the peace in criminal matters to cases where the punishment may not exceed three months' imprisonment or a fine of over \$100, and that since the rules of the excise board under which this prosecution is had provide that the fine may be a sum greater than \$100, and the defendant may be committed to jail, and the liquors seized may be ordered destroyed, the maximum penalty is beyond the jurisdiction of either a justice of the peace or police judges.

It is unnecessary to copy section 64 of the Lincoln charter in full. It confers upon the excise board the exclusive power of licensing and regulating the sale of liquors within the city, provides that the license fee shall not be less than the minimum sum required by the laws of the state, that bonds shall be given, and that "all the restrictions, regulations, forfeitures, and penalties provided by law respecting the sale of liquors by persons licensed therefor by the county board shall apply to and govern all persons licensed by virtue of this section." It is further provided that "any person selling or giving away in said city any liquor of the description mentioned in this section, without first having complied with such regulations, and procured a license or permit therefor, or who shall violate any of the rules and regulations established by such excise board and governing the sale of such liquor, shall on conviction thereof be fined in any sum fixed by such rule, not more than two hundred dollars for each offense and shall be committed to the city jail until such fine and costs are paid." It also provides for the revocation of licenses or permits upon the conviction of the licensee of a violation of the laws or regulations governing the sale of liquor; that the excise board shall control all such places where liquors are sold; and that "all such rules and regulations, when adopted by said board and published once in a daily newspaper published and of general circulation in said city, shall have like force and effect as the ordinances of said city adopted by the city council thereof, and shall be proved in like

manner." Rule 27 of the excise board, adopted in 1906, made it unlawful for any person to keep for the purpose of sale without a license or permit any intoxicating liquors, and rule 28 authorizes the destruction of the liquor seized upon conviction. These sections are almost identical with sections 7170, 7171, Ann. St. 1907, relating to liquors, except that the penalty provided by the statute (Ann. St. sec. 7161) is a fine of not less than \$100 nor more than \$500, or imprisonment not to exceed one month in the county jail; while rule 27 provides that any person found guilty "shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in a sum not less than one hundred dollars for each offense, and be committed to the city jail until such fine or fines and costs are paid." It is upon the difference between the penalties prescribed by the statute and those provided for by the rules that the defendant bases a part of his contention that the police judge was without jurisdiction. His contention is that since the penalty provided by the statute for this offense was beyond the jurisdiction of a justice of the peace, except as an examining magistrate, the police judge could have no other or different powers, and hence had no jurisdiction to try and determine the guilt or innocence of the accused or to impose a fine upon conviction.

Under section 18, art. VI of the constitution, relating to the judicial department, a justice of the peace has no jurisdiction in a criminal case where the punishment may be a fine of over \$100, and under section 260 of the criminal code and section 44 of the Lincoln charter (Ann. St. sec. 7943) the police judge is given exclusive jurisdiction of all offenses against the ordinances of the city, and concurrent jurisdiction with justices of the peace of misdemeanors under the laws of the state arising within the limits of the city, and for the preliminary examination of persons charged with offenses beyond his jurisdiction. The penalty imposed by the general liquor law of the state for the offense with which the defendant was charged

was beyond the jurisdiction of a justice of the peace or a police judge, except as an examining magistrate. When section 64 of the Lincoln charter was enacted, it is evident that it was the intention of the legislature that the wholesome restrictions and regulations surrounding the liquor traffic, and the rigorous forfeitures and penalties provided for its unlawful sale by the statutes, should not be relaxed, and it was therefore therein provided that "all the restrictions, regulations, forfeitures, and penalties provided by law respecting the sale of liquors by persons licensed therefor by the county board shall apply to and govern all persons licensed by virtue of this section." This provision obviated any question that might be raised as to whether the general liquor laws of the state were applicable within the municipal boundaries, and effectually preserved the operation of the general liquor laws of the state within the city.

This section next provides, as we have seen, for a fine of not more than \$200 for a violation of the excise rules. It will be observed that the penalty which is authorized to be inflicted for a violation of the rules of the excise board is a different, and it may be a much smaller, penalty than that provided for the statutory offense. There is thus given to the excise board power to enact rules, a violation of which may be punished by the imposition of a fine of not more than \$200, while it leaves the general provisions of the statute still enforceable by the proper authorities. In *Bailey v. State*, 30 Neb. 855, it appeared that a village board was given power to impose fines for a violation of ordinances "not exceeding one hundred dollars for any one offense," while the liquor law fixed the penalty for the same offense as not less than \$100 nor more than \$500. Bailey was arrested, tried by the justice, found guilty, and sentenced to pay a fine of \$100 and costs. It was urged that the ordinance was void because the board had no power to enact an ordinance providing a different punishment from that provided for a violation of the general law on the same subject, but it was held

that the statute conferred the power to pass such an ordinance upon the village authorities. It was further contended that the provisions of sections 11 and 12 of the Slocumb law (Comp. St. 1907, ch 50), fixing the penalty, and sections 7161, 7162, Ann. St. 1907, providing for a preliminary examination of persons charged with a breach of the statute, fixed a method of procedure which was exclusive, and that, therefore, the justice had no jurisdiction other than to examine and bind over to the district court, but the conviction was sustained. We conclude, therefore, that the general statutes with reference to the sale of liquor are in force within the city of Lincoln, but, at the same time, that the excise board has power to provide rules and fix a punishment for their violation, not, however, in excess of the limitation of \$200 for each offense fixed in the charter. *Sanders v. State*, 34 Neb. 872; Black, Intoxicating Liquors, sec. 225. We find nothing in the statutes which confers any greater power or jurisdiction upon the police judge with respect to the punishment of violation of the rules of the excise board than he possesses with respect to the punishment of offenses against the laws of the state. Under the constitution his jurisdiction to try and determine is limited to criminal cases in which the penalty may not exceed a fine of \$100. Where the punishment may exceed a fine of \$100, he can only sit as an examining magistrate. We conclude, therefore, that the finding of the district court that the police judge was without jurisdiction was right.

We are further of the opinion that in so far as rule 27 seeks to authorize a fine in excess of \$200, the amount limited in the charter for the violation of an excise rule, it is inoperative and void, but this does not affect the otherwise valid provisions of the rule. *State v. Hardy*, 7 Neb. 377; *Bailey v. State*, 30 Neb. 855; *State v. Stuht*, 52 Neb. 209; *Town of Eldora v. Burlingame*, 62 Ia. 32.

We think there can be no doubt of the validity of the provision of the charter giving the rules of the excise board, when duly adopted and published, like force and

Boesen v. Omaha Street R. Co.

effect as ordinances of the city adopted by the city council. The legislature, not being restrained or limited by the constitution, may confer the power upon the excise board to pass such rules, and may provide for their enforcement by such agencies and in such manner as it may direct. See authorities collected in McQuillin, *Municipal Ordinances*, sec. 90; *Riley v. Trenton*, 51 N. J. Law, 498.

Having reached these conclusions, it is unnecessary to determine the other points raised. The judgment of the district court is therefore correct, and the exceptions of the state are

OVERBULED.

FAWCETT, J., not sitting.

JOHN BOESEN, APPELLEE, v. OMAHA STREET RAILWAY
COMPANY, APPELLANT.

FILED FEBRUARY 6, 1909. No. 15,922.

1. **Trial: INSTRUCTIONS: EVIDENCE.** In this an action for personal injuries alleged to have been occasioned by the derailment of a street car, whereby the plaintiff was thrown from the car and thereby injured, the defendant pleads contributory negligence, in that the plaintiff was negligently standing upon the running board of the car at the time of the accident, and his injuries resulted from such negligence. *Held*, That it was not error to refuse an instruction that if the jury believe from the evidence that the plaintiff was not thrown from the car; but that he attempted to get off the car when it was in motion, and fell into the street, their verdict should be for the defendant, since such an instruction is neither within the issues made by the pleadings nor the evidence in the case.
2. ———: ———: **CONSTRUCTION.** Instructions should be considered together. Separate clauses or parts of a sentence should not be separated from the context in order to arrive at the true meaning of the language, but all that is said upon the particular subject is to be taken.
3. **Appeal: EVIDENCE: HARMLESS ERROR.** A witness testified that the plaintiff "was thrown from the car," but he testified later that

Boesen v. Omaha Street R. Co.

he did not see the plaintiff until he was lying on the ground. A motion to strike his answer as being merely a conclusion of the witness was overruled, and exception taken. *Held*, That, while the answer should have been stricken, the error was not prejudicial, since the jury could not have been misled by the testimony.

APPEAL from the district court for Douglas county:
ALEXANDER C. TROUP, JUDGE. *Affirmed*.

John L. Webster and W. J. Connell, for appellant.

T. W. Blackburn and R. S. Horton, contra.

LETTON, J.

This is the fourth appearance of this case in this court. See 68 Neb. 437; 74 Neb. 769; 79 Neb. 381. The facts are fully set forth in the former opinions. On account of the nature of some of the errors assigned, it becomes necessary to notice particularly the issues as now presented by the pleadings. The petition, in substance, alleges that the defendant is a common carrier of passengers operating a street railway in the city of Omaha; that, while the plaintiff was a passenger, the car upon which he was riding, through the negligence of the defendant, suddenly left the track and threw the plaintiff violently to the pavement, and that he was permanently injured by the accident. The answer denies that the car left the track and threw plaintiff to the pavement, avers that the car and track were in good order and condition, and were so long before, at the time of, and after the accident. It also avers that the accident was caused from extraneous causes over which the defendant had no control. It also alleges that the defendant was guilty of contributory negligence in riding upon the running board of the car, denies that the plaintiff has been injured permanently or to any extent, and further contains a general denial. The reply denies the new matter in the answer. The case was tried to a jury, and a judgment rendered for the plaintiff, from which defendant appeals.

1. The first complaint made is that the court should have given an instruction requested by the defendant to the effect that if the jury believed from the evidence that the plaintiff was not thrown from the car, but that he attempted to get off the car when it was in motion, and fell into the street, their verdict should be for the defendant, and it is argued in support of this assignment that the theory and contention of the railway company on this trial are the same as they were at the time this case was before the court for the first time. The defendant is in error upon this point. The issues, as will be observed, are the same as when the case was presented here the last time. After reading the evidence, we adopt and fully agree with the statement made in the opinion by Mr. Commissioner Duffie on that occasion that "we have searched the record in vain for any evidence tending to show that the plaintiff of his own volition got off the car while it was in motion." There was no error in refusing this instruction.

2. The seventh instruction given by the court is said to be erroneous. By the fifth instruction the jury were instructed that a street railway is not an insurer of the personal safety of its passengers, nor is it bound to do everything which possibly might be done to insure their safety. It is bound to exercise the utmost skill, diligence and foresight consistent with the practical conduct of its business, and a failure on its part to exercise such skill, diligence and foresight would be negligence. By the seventh instruction the jury were told, in substance, that the defendant had alleged in its answer the good order and condition of its car and track, and that the accident occurred presumably from extraneous causes which could not be guarded against by the exercise of the greatest care, skill and diligence of the defendant, and the jury were told that if they found "that the derailment of the car on which the plaintiff was riding (should you find that the same was derailed) was one of those unforeseen accidents that could not have been guarded against or prevented by the exercise of the highest degree of care,

diligence and foresight on the part of the defendant, consistent with the practical conduct of its business, and that said defendant was not guilty of the slightest negligence which contributed to the said accident, then the defendant would not be liable to the plaintiff for injuries sustained by him, and your verdict should be for the defendant." The defendant calls special attention to the following clause in the seventh instruction: "And that said defendant was not guilty of the slightest negligence"—and contends that this language was highly prejudicial as imposing an undue burden upon the defendant, and that the extent of its duty is to exercise the highest degree of care, diligence and foresight consistent with the practical conduct of its business, and no more.

Instructions should be considered together. Separate clauses or parts of a sentence should not be disconnected from the context, if it is desired to obtain the true meaning of the language. Taking the two instructions referred to together, while the language of the latter may not be entirely proper, we think it impossible that the jury could have been misled with regard to the extent of the duty imposed by law upon the defendant with regard to the care of its passengers, and, when considered in connection with the evidence in this case, we cannot see how this language, even if objectionable in nature, in anywise prejudices the defendant.

3. The eighth instruction is also complained of. This instruction is quite lengthy. It states the defendant's plea of contributory negligence, in that at the time of the accident the plaintiff was standing upon the running board of the car. It defines contributory negligence, and instructs the jury that the burden of proof is upon the defendant to establish this defense. It further instructs them that, if he was standing upon the running board at the direction of the conductor of the car, this "would not constitute negligence on his part, but the negligence, if any, in so standing where he was directed, would be the negligence of the

defendant company." It is the quoted portion which is specifically claimed to be erroneous. We fail to see wherein this instruction is prejudicial to the defendant. While the clause complained of, "but the negligence, if any, in so standing where he was directed, would be the negligence of the defendant company," we think adds nothing beneficial to the plaintiff or prejudicial to the defendant, this statement was made in the opinion of Mr. Commissioner DUFFIE in this case, and we cannot see but that it is a correct proposition of law. If the conductor in charge of the car directed the plaintiff to stand upon the running board, and as a consequence thereof he was injured, we think it ordinarily would be the negligence of the company, since within reasonable limits the conductor has the right to designate upon what part of the car a passenger may ride, and if it is a place which is known to be not necessarily dangerous, and which is used by passengers as a matter of custom and usage well known to the company, the negligence, if any, is not that of the passenger, but of the carrier, since it ought to be better advised as to the safety of any portion of its vehicles than an ordinary passenger.

4. The defendant complains of the refusal of certain instructions requested by it. We have examined these instructions and think that, in so far as they are material or proper, the substance of them had already been given, either by the court upon its own motion or in the instructions requested by the defendant and given.

5. Error is assigned with reference to certain rulings upon the admission of a portion of the testimony of the witness Jodeit. In that portion of the testimony objected to, Jodeit stated, in substance, that he saw the plaintiff at Twenty-fourth and O streets; that "he was thrown off the car"; that Jodeit was in the car; that "the car went straight south on Twenty-fourth street, and the motor went over, and the trailer took the Y, and from the circumstances from what I know threw him out." The defendant objected to some of the questions which

elicited this evidence, and also moved to strike out the answers and conclusions of the witness, for the reason that they were shown to be merely a conclusion, and argued that it clearly appeared from the record that the first time the witness saw Boesen was when he was lying in the street back of the car. The objections and motion were overruled. We are inclined to think the answers complained of should have been stricken out, but we fail to see wherein any error prejudicial to the defendant was committed. The witness stated that he did not see Boesen until he was lying on the street, and it must have been clearly apparent to any jurymen of ordinary intelligence that, when the witness said Boesen was thrown from the car, he was merely testifying to his idea as to how the accident happened. We must presume that the jurors were men of ordinary common sense, and it is also an entirely safe presumption that the learned and diligent counsel for the defendant did not fail to dissect this testimony and clearly eliminate from the minds of the jury any erroneous notions as to its effect. The general credibility of Jodeit is also strongly assailed, but this is a matter entirely for the jury, and, whatever may be our own opinion as to its credibility, we have no right to interfere with their verdict upon that ground alone.

6. It is also contended that the verdict is not sustained by the evidence, but with this contention we cannot agree. It is true that a number of conductors and motormen testify that they had been over this track repeatedly on the day that the accident happened, and that the car and the track and switch were in proper condition. The conductor and motorman on the car upon which Boesen was riding also denied that the trailer left the track. It appears, however, that the witness Tobin, who was a passenger and who was called by the defendant, testified on cross-examination that the car stopped because it was off the track. It was also shown that Motorman Lear, who was in charge of the car the morning that the accident occurred and who at this trial denied that the trailer

Larsen v. Sanzier.

left the track at the switch, testified on cross-examination at the former trial, as follows: "Q. Did you notice that switch that morning as you went over it? A. No, sir; not any more than I would any other morning. Q. Did you notice it any other time that day more than you did that morning? A. I looked to see if there was anything wrong with it." He then denied that the following question had been put to him, and denied the answer: "Q. Why? A. The trailer left the tracks there." But it was proved by the official stenographer who took the testimony of Mr. Lear at the first trial that he did in fact testify as above. In addition to this testimony given by the defendant's witnesses, the evidence of the plaintiff and the witness Oeldeman to the same effect amply sustain the findings of the jury with reference to the trailer leaving the track at the switch. In such cases it is to be expected that the evidence will be conflicting; otherwise, in all probability, there would be no contention between the parties.

In the whole record we find no prejudicial error. The judgment of the district court is therefore

AFFIRMED.

FAWCETT, J. I am unwilling to hold that the giving of instruction No. 7 was not reversible error.

BARNES, J. I am unable to approve of instruction No. 7, but otherwise concur in the opinion of the majority of the court.

ANNA M. LARSEN, APPELLEE, v. JOSEPH SANZIERI,
APPELLANT.

FILED FEBRUARY 6, 1909. No. 15,463.

Appeal: EJECTMENT: INSTRUCTIONS: WAIVER. In 1893 L., by virtue of an executory contract with P., entered into possession of five acres of land. For ten years L. made payments thereon, and then received a deed from P. for said five acres only. When L.

took such possession, the five acres were part of a larger tract, all of which was uncultivated and covered with brush. By mistake L. encroached on a strip of P.'s land adjoining said five acre tract, cleared and cultivated it, and received the exclusive benefit therefrom for more than ten years. L. testified that he discovered his mistake within a year and held possession adverse to P. *Held*, in ejectment by P.'s grantee against L.'s grantee, that as the court had instructed the jury that unless L.'s possession was hostile in its inception they should find for defendant, and no exception was taken thereto, a verdict for defendant was sustained by the evidence.

APPEAL from the district court for Douglas county:
GEORGE A. DAY, JUDGE. *Affirmed.*

H. Fischer, for appellant.

Guy R. C. Read, contra.

Root, J.

Ejectment to recover possession of a strip of land 18 feet in width. Trial to a jury, verdict and judgment for plaintiff. Defendant appeals.

No exception was taken by defendant to any of the court's instructions, nor does he claim that they were erroneous, but asserts that the evidence does not sustain the verdict of the jury. It will be unnecessary to ascertain whether the instructions correctly reflect the law, for, if the verdict responds thereto and is supported by the evidence, the judgment was right, as it was the duty of the jurors to follow said instructions. *Boyesen v. Heidelbrecht*, 56 Neb. 570. The jurors were instructed that plaintiff was entitled to recover unless defendant proved by a preponderance of the evidence that he had acquired title by adverse possession to the land in controversy, and that to establish such defense he must prove that such possession was hostile in its inception and continued uninterruptedly for ten years, was open, notorious, adverse, and exclusive, and held during all of that time under claim of ownership.

Emanuel Long, in March, 1893, agreed to purchase five acres of land in Douglas county from Perkins, who resided in Iowa. The tract was covered with brush, and was part of 80 acres then owned by Perkins. Long testified that he went into possession of the five-acre tract by virtue of his contract with Perkins, and took possession of this strip of land which joins his five-acre tract, and that he did not know for a year that said land was not included in his purchase, but that he continued in possession and claimed to own it, not by virtue of his contract with Perkins, but by possession merely; that he never disclosed to Perkins his intentions, but continued regularly to make payments on said land and received a deed for the five-acre tract in 1901; and that he has held undisputed possession of the land in controversy since 1893 or 1894, and enjoyed all profits therefrom until 1905, the date he conveyed the land to defendant, but did not pay any taxes thereon. Defendant has held possession of the disputed tract since 1905, and honestly believed that it was described in Long's deed to him, and has had the exclusive use thereof since his said purchase. Long went into possession under Perkins, and that possession was not hostile, but subject to Perkin's rights, and thus continued for at least a year. *Beer v. Dalton*, 3 Neb. (Unof.), 694; *Kirk v. Taylor's Heirs*, 8 B. Mon. (Ky.) 262; *McKelvain v. Allen*, 58 Tex. 383; *Jackson v. Walker*, 7 Cow. (N. Y.) *637.

Under the instruction that unless Long's possession was hostile in its inception the jurors should find for defendant, they could not do otherwise than to return the verdict that they did. On the other hand, if defendant is entitled to the benefit of the law that possession need not be hostile in its inception, but that the statute would commence to run as soon as such possession was adverse (*Cervena v. Thurston*, 59 Neb. 343), then it was still for the jury to say from Mr. Long's testimony whether that possession ever did become adverse (*Gaines v. Saunders*, 87 Mo., 557). Nor was the jury bound to find for defend-

Smith v. Chicago, B. & Q. R. Co.

ant upon the uncorroborated testimony of his grantor. *Bush v. Griffin*, 76 Neb. 214; *Knight v. Denman*, 64 Neb. 814.

As controlled by the court's instructions, the evidence cannot be said to be insufficient to sustain the verdict, and the judgment of the district court, therefore, is

AFFIRMED.

FAWCETT, J., not sitting.

C. E. V. SMITH, ADMINISTRATOR, APPELLEE, v. CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY, APPELLANT.

FILED FEBRUARY 6, 1909. No. 15,493.

Waters: OBSTRUCTIONS BY RAILROAD. A railway company in constructing its road filled in a ravine and substituted another way for flood waters that would otherwise pass down said watercourse. Subsequent to such construction it became apparent that the artificial watercourse did not have the same capacity as the natural one. *Held*, That the railway company was bound to know that excessive rains might occur at any time and damage result as a consequence of the inadequate provisions made by it as foresaid.

LIABILITY OF LESSEES. That a lessee of the original owner and builder of said road is also charged in law with notice of said conditions and liable for damages resulting from its failure to exercise reasonable diligence to protect adjacent land-owners from the consequences of its neglect.

Appeal: INSTRUCTIONS. A new trial will not be granted because instructions are somewhat confusing and contradictory, where they are favorable to the defeated litigant, and evidently did not mislead the jury.

APPEAL from the district court for Furnas County:
ROBERT C. ORR, JUDGE. *Affirmed.*

J. E. Kelby, Halleck F. Rose, Frank E. Bishop, Byron Mark and Fred M. Dewcese, for appellant.

J. F. Fults and E. B. Perry, contra.

ROOT, J.

Appeal from a judgment on the verdict of a jury for damages.

Beaver creek flows east and west through sections 25 and 26, town 2, range 24, Furnas county. In 1887 the Oxford & Kansas Railroad Company constructed its railway east and west through said sections and about 40 rods north of said creek. The village of Wilsonville is situated on section 26 and principally north of the railway. A ravine runs south into Beaver creek about the west line of section 26, and one of like character is situated about the center of section 25. About the center of section 26, a smaller ravine runs south from about the north line of the railway right of way to said creek. In the construction of the railway, the last mentioned draw was filled in across the right of way. A ditch was then constructed north of and parallel with the railway so that the water that theretofore would pass down the draw in the center of said section was forced east or west for a considerable distance and discharged into the ravine west of said town or through a culvert about 600 feet east of the village. The water that passed through said culvert would spread over considerable territory and flow towards and into Beaver creek. About the time that the railway was constructed a water-power mill was built on Beaver creek southeast of Wilsonville. The testimony is undisputed that the provision made by the railway company for the drainage of the surface water that collected north of its railway was insufficient; that before said road was built the surface water did not cover the land south of the railway grade and north of the creek, but flowed into the ravines and draw described and thence continued into said stream. In July, 1905, after a heavy rain, the flood waters which accumulated north of the railway were held back and retained by said grade, and a considerable part thereof escaped through the opening east of Wilsonville and, controlled by the law of gravitation, flowed down toward and

against the corner of said mill, inflicting substantial damage thereto.

1. The first proposition advanced by defendant is that the proof does not establish that defendant had notice that the provisions for drainage at said point were insufficient, and therefore it was not liable for a nuisance which it did not construct. The contrary rule is announced in *Morse v. Chicago, B. & Q. R. Co.*, 81 Neb. 745. While the general rule as to landlord and tenant may be as suggested by counsel, and might apply to railway companies as to some nuisances, we do not think it should control in relation to those active duties which the law imposes on every railway company with relation to the construction and maintenance of its railway. Those duties concerning provision for the accommodation of flood waters are succinctly, and we believe correctly, set forth in *Morse v. Chicago, B. & Q. R. Co.*, *supra*; *Dickson v. Chicago, R. I. & P. R. Co.*, 71 Mo. 575; *Clark v. Dyer*, 81 Tex. 339; *Brown v. Carolina C. R. Co.*, 83 N. Car. 128.

2. The court instructed the jury that the burden was on plaintiff to prove his damage; that the same resulted from defendant's negligence as set forth in the petition; that it was the duty of a railway company in constructing its roadbed across a ravine or other natural watercourse, so far as consistent with the safe and proper operation of its road, to provide for the discharge of such water as would naturally flow therein; that the original owner of the railway had the right to control and change the direction of surface water, and, if it did not negligently and unnecessarily make such change, it would not be liable, and that defendant was not liable for the original construction of said road; that defendant would not be liable for unprecedented and excessive rainfall, and that it was the duty of the village authorities to keep open the waterways outside of the right of way but within the corporate limits. The jury, after considering the case, requested further instruction, and were informed again that defendant was not liable for the acts of its predecessors, "but

any act by the defendant company which caused or contributed to damming up or changing the course of such surface water and which unnecessarily and negligently damaged the plaintiff, for such damage the defendant company would be liable." Counsel assert that this instruction made defendant liable, without reference to negligence, for any act on its part which contributed to the injury. The words "which unnecessarily and negligently damaged the plaintiff" so qualified the preceding language that the instruction is not open to the criticism made. The instructions, when considered in connection with each other, are as favorable to defendant as the law warrants.

3. It is argued that, if defendant provided for the passage of such flood waters as might reasonably be contemplated at the time the road was built, it was not guilty of negligence, and that the evidence does not affirmatively establish that such provisions were insufficient. The evidence upon this point is not as clear as a court might desire, but it does appear that a sewer pipe beneath the roadbed of the railway at a point between the old channel and the culvert east of the town had become filled up with dirt at the time of the flood so that the provisions originally made by the railway were not continued. The testimony further discloses that the railway grade holds back surface water north of the railway after rains so that a pond is formed which remains for a time; that before the construction of said grade such waters passed down the ravine which the railway filled up. A greater amount of water was thus held back in July, 1905, than after ordinary rains, and probably more than ever before in the history of the railway, but there were sufficient facts before defendant and its predecessors to warn and instruct them that they had not made provision for the usual and ordinary flow of the water at said point. Having knowledge of that fact, defendant and its predecessors were charged with further notice that unusual rains might occur and that the channel that did not suffice for ordi-

Kennison v. State.

nary rains would be totally insufficient for excessive ones. A rainfall of two inches on each of two days, such as the evidence establishes occurred in the instant case, cannot be said to be excessive or so unusual that defendant ought not to have anticipated it. *Fairbury Brick Co. v. Chicago, R. I. & P. R. Co.*, 79 Neb. 854.

4. The objections concerning the admission of evidence need not be referred to in detail. We have considered all of them, and they do not entitle defendant to a reversal. There is not any substantial conflict in the evidence, nor any question but that the verdict is for a much smaller sum than the amount of plaintiff's damages.

The judgment of the district court, therefore, is

AFFIRMED.

ERNEST S. KENNISON v. STATE OF NEBRASKA.

FILED FEBRUARY 6, 1909. No. 15,718.

1. **Criminal Law: VENUE: WAIVER.** The constitutional right to a trial before a jury of the county where the crime is alleged to have been committed is a mere personal privilege of the accused which he will waive, if the venue is changed at his request, without objection, and he appears without protest, and goes to trial and for the first time objects in the supreme court, although the venue is not changed to an adjoining county. *State v. Crinklaw*, 40 Neb. 759.
2. ———: **REVIEW: PRESUMPTIONS: SELECTING JURY.** Error is not presumed, and this court will not reverse a conviction because of alleged error in overruling challenges to jurors for cause, and because it is claimed that defendant exhausted his peremptory challenges on jurors who should have been excused for cause, where the record does not affirmatively support such assignment. *Shumway v. State*, 82 Neb. 165.
3. **Homicide: INSTRUCTIONS.** K., after a fist fight with C., drew a revolver and fired twice at his antagonist, who grappled with him, and during the struggle the weapon while in K.'s hand was discharged and C. mortally wounded. The court fully instructed the jury concerning all of the degrees of homicide and the subject of self-defense. *Held*, That, if K. did not act in self-defense but

Kennison v. State.

purposely and unlawfully in presenting his firearm and shooting at C., the last shot would refer back to the purpose with which K. commenced to shoot, and that he was not entitled to an instruction on the theory that the killing was accidental.

4. ———: ———. Instructions criticised by defendant examined, and *held* to present the law of self-defense to the jury.
5. ———: MISCONDUCT OF ATTORNEY. Alleged misconduct of an assistant prosecuting attorney *held* not to have been prejudicially erroneous to defendant.
6. ———: TRIAL. It is the province of the district court to regulate the course of business during the progress of trials, and, during the term, to control its own sittings, and an order made compelling counsel for defendant in a criminal case to argue said cause at night, unless it clearly and unmistakably appears that defendant was prejudiced thereby, will not entitle defendant to a new trial.
7. ———: NEW TRIAL: LIMITATION OF ARGUMENT. An order of the court limiting counsel for the state and defense in a murder trial to two hours and fifteen minutes on a side within which to present their arguments will not justify this court granting a new trial, and especially where the record does not disclose that at the end of the time limited counsel requested an extension of time.
8. ———: ———: REPROOF OF COUNSEL. It is the duty of counsel to obey the instructions of the trial court to not interrupt opposing counsel while he is propounding questions to a witness, and, if counsel is contumacious, the court may, with propriety, threaten to discipline him, and such fact will not so impede the course of justice as to entitle defendant to a new trial.

ERROR to the district court for Kimball county: HANSON M. GRIMES, JUDGE. *Affirmed.*

Hamer & Hamer, for plaintiff in error.

William T. Thompson, Attorney General, and *Grant G. Martin*, *contra*.

ROOT, J.

Defendant appeals from a sentence of 23 years at hard labor in the state penitentiary upon a conviction of murder in the second degree. This is a second appeal, a former conviction having been reversed. 80 Neb. 688.

1. Defendant asserts that the district court for Kimball county did not acquire jurisdiction to try him, because it does not join any part of Scott's Bluff county, where the crime is alleged to have been committed. After reversal, on defendant's application, a change of venue was granted. The transcript discloses that defendant made a written application for a change "to some adjoining county," and the court ordered: "It is directed and ordered upon the request of the defendant that the venue thereof (of the case) and the place of trial be and the same is hereby changed to the county of Kimball." The attorney general asserts that this record establishes that defendant is responsible for said order and all that it contains, whereas defendant contends that he asked merely for a change to an adjoining county. The transcript discloses that two entries were made the same day in said case in Scott's Bluff county. One recites the making of the order for a change of venue merely, and the other that it was made at defendant's request. Defendant presents the record as a true one, and we shall treat the latter order as correct. Defendant did not object to the entry or take any exception thereto. He has not preserved the evidence upon which it was made, nor did he challenge the jurisdiction of the district court for Kimball county to try him. In fact, except as he raises the point in his brief, the record is silent as to any objection on his part concerning the change of venue. In *State v. Crinklaw*, 40 Neb. 759, we held that the constitutional right to a trial before a jury of the county where the crime was committed is a mere personal privilege of the accused which he would waive by applying for a change of venue. Defendant ought not to complain of that to which he not only consented but actually procured. Nor does the fact that the waiver applies to a constitutional right lessen its force or application. 1 Bishop, New Criminal Law, secs. 995, 996; 1 Bishop, New Criminal Procedure, sec. 50; *Kent v. State*, 64 Ark. 247; *State v. Hoffmann*, 75 Mo. App. 380; *Weyrich v. People*, 89 Ill. 90; *Lightfoot v. Commonwealth*, 80 Ky. 516; *Perteet*

v. People, 70 Ill. 171; *Krebs v. State*, 8 Tex. App. 1; *State v. Kent*, 5 N. Dak. 516. The district court for Kimball county had jurisdiction to try defendant.

2. It is argued in the brief that the court erred in overruling defendant's challenges for cause to the veniremen Bobbit and Brown. Neither of those gentlemen formed part of the jury that tried defendant, nor does the record affirmatively disclose that he employed any of his peremptory challenges to exclude them therefrom. For all the record advises us, they may have been excused on the peremptory challenge of the state or by agreement of the parties. Error will not be presumed, and defendant's said assignment of error is not well taken.

3. Defendant requested and the court refused the following instructions:

"1. If you find that the revolver was accidentally discharged at the time the last shot was fired, neither the deceased nor the defendant having complete control of the revolver, but both struggling for the possession of it, or if you have a reasonable doubt whether it was not so discharged, you cannot find the defendant guilty of murder in the first or second degree.

"2. Before you can find the defendant guilty of murder in the first degree or murder in the second degree, you must find that he intended to cause the death of the deceased and that he purposely discharged the revolver at the time the last shot was fired. If the discharge of the revolver at that time was accidental or you have a reasonable doubt whether it was not accidental, you should acquit the defendant of murder in the first and second degree."

Counsel assert that there was sufficient evidence tending to support their theory of an accidental discharge of the revolver to entitle them to these instructions. The court had with commendable clearness instructed the jurors as to the various degrees of homicide, and that the burden was on the state to prove the elements essential to constitute murder in the first or second degree or manslaughter,

as the case might be, and that defendant was not guilty of murder in the second degree unless he maliciously and purposely killed the deceased. It had also given defendant the benefit of the defense of intoxication and of self-defense. The testimony tends to prove that defendant for some weeks preceding the tragedy had entertained the thought of beating Mr. Cox, the deceased; that on one occasion he had challenged him to fight in the street, and Cox had refused; that he frequently referred to deceased in vile language; that on the afternoon of the 29th, the day the crime was committed, defendant stated that Cox had to take a whipping, that there was no way out of it; and that a short time before the encounter defendant had stated that he would whip the first man he met that afternoon that he didn't like. Defendant then went into a drug store for some purposes of his own, and, coming out, stated to the deceased, who was also in said store, that he wanted to see him, and Cox went out with defendant. Soon thereafter the noise of scuffling attracted attention, and individuals in a bank and store building either went to the windows or out into the street, and noticed Kennison and Cox fighting. One witness claims to have seen the first blow struck, and testified that defendant was the aggressor, whereas Kennison testified that Cox was the guilty person. The testimony is overwhelming that, although Cox was the better boxer and was more than holding his own, he retreated from 20 to 40 feet from the point where the fight commenced, and finally knocked defendant against a store building, and then stepped back about 6 feet with his hands at his sides; whereupon Kennison drew a revolver from his pocket and fired at Cox. Cox then rushed toward defendant, was shot in the left arm, and, after the parties had grappled, the fatal shot was fired, so that the bullet penetrated the neck of deceased about two inches below the lobe of the left ear, and, following a downward course, severed veins and arteries, causing almost instant death. No witness other than defendant testified that Cox had made any movement intermediate

the time defendant was knocked against the building and the instant that Kennison put his hand back toward his hip pocket. Defendant excuses his conduct in commencing to shoot by saying that he was whipped and scared; that he had thrown up his hand and asked Cox to quit; whereas witnesses but a few feet distant testified that they only heard Kennison utter an oath. Defendant did not testify that he feared any serious beating at the hands of Cox, nor does that seem probable with several disinterested men within 20 feet of him.

The court, in its solicitude for defendant, gave instructions concerning self-defense, and properly refused to mingle therewith anything relating to an accidental discharge of the firearm. Defendant did not accidentally draw the revolver from his pocket or by misadventure point it at and shoot Cox. There is no claim that the first and second shots were not the result of intent, action and control on the part of Kennison. If the circumstances warranted him in shooting in self-defense, he was justified in doing what was done up to that time, and still more would he be justified in acting when his adversary had grappled with him. On the other hand, if not warranted in firing the first and second shots, he cannot be excused for the third one, nor can it be said that he purposely fired the former shots and did not intentionally cause the last one. Defendant's purpose in this last act of the tragedy will refer back to the criminal intent, if any, that accompanied his actions in presenting his revolver and firing the first shot at Mr. Cox. *Holmes v. State*, 88 Ala. 26, 16 Am. St. Rep. 17; *Epps v. State*, 19 Ga. 102; Wharton, Homicide (3d ed.) sec. 356. Moreover, the testimony tends to prove that defendant expressed the keenest satisfaction when informed that Cox was dead. He denied making those statements, but we are satisfied that he made them, and such conduct destroys his present assertion that the killing was accidental. *State v. Botha*, 27 Utah, 289, 75 Pac. 731.

4. The fifteenth instruction given by the court is as-

sailed by counsel, and is as follows: "The jury are instructed that, in considering whether the killing was justifiable on the ground that the killing was in self-defense, the jury should consider all the circumstances attending the killing, the conduct of the parties at the time and immediately prior thereto, and the degree of force used by the defendant in making what is claimed to be his self-defense, as bearing upon the question whether the shot, if fired, was actually done in self-defense, or whether it was done in carrying out an unlawful purpose. If the jury believe from all the evidence that the force used was reasonable in character, and such as a reasonable mind would have so considered under the circumstances, it is proper for the jury to consider that fact in determining whether or not the killing was done in self-defense." This instruction was supplemented by instructions numbered 16, 18 and 19, given by the court on its own motion, instruction numbered 1, requested by the state, and instructions numbered 3 and 5, requested by defendant, and, combined, they fairly state the law of self-defense. *Carleton v. State*, 43 Neb. 373; *Davis v. State*, 31 Neb. 240. Counsel, however, argue that the theory of the defense was not self-defense, but accidental killing, and that the opinion of Judge Letton establishes that defense as the law of this case, and the district court was bound to submit it to the jury. Whatever may have been written by Judge LETTON to demonstrate error in certain instructions given on the former trial, the opinion does not hold as contended by defendant, and the district court did not err in this particular.

5. It is argued that the first instruction given by the court at the request of the state does not correctly state the law of self-defense. If, as counsel elsewhere argue in their brief, the theory of the defendant was not self-defense, but an accidental killing, we fail to appreciate any prejudicial error in imperfectly instructing upon a defense not available for defendant. If this instruction is read in connection with the other instructions on said

subject, it will be found that all of the elements of self-defense were minutely and correctly explained to the jurors.

6. It is argued that counsel who assisted the prosecuting attorney in the district court was guilty of misconduct in the examination of witnesses, in statements made during the trial, in causing one Wilkinson to be attached for contempt of court, and in his argument to the jury. We do not commend much that was said and done by counsel, but the trial court, so far as the record made at the time of the trial discloses, ruled promptly and properly, and instructed the jury not to consider the remarks made by counsel during the trial of the case. We do not consider that because of any or all of said improprieties a new trial should be granted. *Bohanan v. State*, 18 Neb. 57, 78; *Argabright v. State*, 62 Neb. 402.

7. It is suggested that there was an abuse of discretion by the trial court in compelling counsel to conclude their argument Saturday night and in limiting the time therefor. Tuesday and Wednesday of the trial week were consumed in selecting a jury, Thursday, Friday and Saturday thereof in the taking of testimony, including two evening sessions. At 7 o'clock P. M. Saturday, all testimony having been offered, the court over defendant's objections directed the final submission of the case that night and limited each side to two hours and fifteen minutes within which to make their arguments. We are not advised concerning the reasons that prompted the court to make said orders, except that some of the jurors preferred to have the case finally submitted that night. The trial court is vested with great discretion in these matters, and unless we can say that discretion has been abused to defendant's prejudice we cannot interfere. It is doubtless true that counsel were somewhat exhausted after their strenuous labor of the week, but the trial court could better judge of that fact than we can, and we are not justified in interfering. *Wartena v. State*, 105 Ind. 445. Counsel assert that it was impossible to properly present an argument

within the limited time. While many witnesses had been examined, the facts testified to were not intricate. The same counsel had previously tried the case, and must have understood and remembered the testimony of the various witnesses, and we do not find that the court abused its discretion in the premises. Nor does the record disclose that counsel asked for an extension of time at the end of their argument. In *State v. Collins*, 70 N. Car. 241, a homicide case, it was held not reversible error to limit the argument of counsel for defense to one hour and a half. *Hart v. State*, 14 Neb. 572; *Rhea v. State*, 63 Neb. 461. While the court acted within its discretion, we do not commend the practice, and especially in cases like the one at bar.

8. Complaint is made that the trial court threatened to send counsel for defendant to jail if he would not obey an order to desist from interrupting the examination of a witness. The record discloses that counsel was not sent to jail, but that he continued to represent his client, and that he refrained from the obnoxious practice which incited the action of the court, and we fail to discern any error in this part of the trial.

This verdict of murder in the second degree is the second one of that character that has been found against defendant. The evidence amply sustains the finding of the jury. The record will not justify a reversal, and the judgment is therefore

AFFIRMED.

ROSE, J., not sitting.

WILLIAM M. MINER, APPELLEE, v. ESTHER E. MORGAN,
APPELLANT.

FILED FEBRUARY 6, 1909. No. 15,444.

1. **Pleading: REPLY: DEPARTURE.** Where a petition to quiet title states that defendant has no interest in the land, but claims an unfounded dower interest therein, a reply alleging the claim is unfounded by reason of defendant's nonresidence does not introduce a new cause of action.
2. ———: ———: ———: **WAIVER.** A defendant who submits his defense to the court on issues raised by the reply, without attacking it in any form, waives the objection that it introduces a new cause of action. *Gregory v. Kaar*, 36 Neb. 533.
3. **Appeal: ISSUES.** On appeal from a decree in a suit against a widow to quiet plaintiff's title to land, her homestead interest cannot be considered on a record which fails to disclose, either by pleading or proof, that the land had ever been occupied or claimed as a homestead.
4. **Dower: NONRESIDENTS.** "Where a husband conveys lands in this state while his wife is a nonresident thereof, she has no dower interest in the lands thus conveyed." *Atkins v. Atkins*, 18 Neb. 474, followed.
5. ———: ———: **EVIDENCE.** Proof that a man left his wife in Wisconsin, came to Nebraska in 1870, never lived with her afterward, concealed his residence from her for nine years, represented himself to be a single man, and conveyed land as such, moved in 1888 to Kansas, where he died in 1902, his wife never having lived in this state until after his death, *held* sufficient to sustain a finding that she was a nonresident, within the meaning of the statute limiting the dower right of a woman living out of the state to lands in which her husband died seized.
6. **Constitutional Law: DOWER.** A statute limiting the dower right of a nonresident widow to lands of which her husband died seized, and extending the dower right of a resident widow to other lands, *held* not inhibited by constitutional provisions relating to due process of law and to distinctions between resident aliens and citizens in the possession, enjoyment or descent of property.

APPEAL from the district court for Webster county: ED
L. ADAMS, JUDGE. *Affirmed.*

John L. Webster, Victor McLucas and E. U. Overman,
for appellant.

Bernard McNeny, contra.

ROSE, J.

This is a suit to quiet plaintiff's title to a quarter section of land in Webster county. In his petition plaintiff alleges in substance the following facts: Milton M. Morgan owned the land September 13, 1881, and on that date conveyed it by a warranty deed, describing himself as a single man, to Charles F. Allen. By mesne conveyances it was transferred to plaintiff, May 8, 1902. Defendant claims she was the wife of Morgan when he executed the deed mentioned, and is now his widow and has a dower interest in the land. Plaintiff further pleads that the claims of defendant are unfounded, that she has no estate or interest in the premises, that her claims are clouds upon plaintiff's title, and that Morgan died in Kansas, January 28, 1902. By answer defendant avers she was married to Morgan August 5, 1855, was his lawful wife until his death, and is entitled to the rents and profits of one-third of the land from January 28, 1902, by virtue of her dower interest. She also avers that she is a resident of Douglas county, Nebraska, and that Morgan left surviving him the defendant, his wife, and two daughters. Plaintiff filed a reply, in which he stated that defendant was a nonresident of the state of Nebraska, September 13, 1881, when Milton M. Morgan deeded the land to Charles F. Allen, and that at the time of the death of Morgan he and defendant were nonresidents of the state of Nebraska; the defendant being a resident of Wisconsin, and Morgan being a resident of Kansas. The district court found the issues thus joined in favor of plaintiff and entered a decree in his favor. Defendant appeals.

The first assignment of error argued by defendant is

Miner v. Morgan.

based on the assertion that the reply introduces a new cause of action. It is insisted that defendant's nonresidence is for the first time pleaded in the reply to defeat her dower. In this situation defendant invokes the rule that plaintiff can recover only on the cause of action stated in the petition, and the reply cannot introduce a new one. The petition states defendant has no interest or estate in the land, but that she claims a dower interest which is unfounded. The reply, by alleging facts which show that the claim of dower is unfounded by reason of defendant's nonresidence, does not introduce a new cause of action. In any event the reply was not assailed in any form in the lower court, and defendant went to trial on the issues raised by it and the other pleadings. The objection now made by defendant is therefore waived. *Gregory v. Kaar*, 36 Neb. 533.

Another point argued by defendant is that the realty in controversy was the homestead of the Morgan family, and therefore was not conveyed to Morgan's grantee, September 13, 1881, by the deed to which defendant was not a party. The answer to this argument is there is no pleading or proof to show that the property was ever claimed or occupied as a homestead by either defendant or her husband.

Defendant's principal argument is directed to the proposition that her absence from the state did not deprive her of her dower rights. The facts upon which this argument rests, as contended by defendant in her brief, are that the Morgans did not own a home in Wisconsin; that the husband, as the head of the family, went to Nebraska to take up a homestead, and, when settled and established, was to send for his family; that they had lived together more than 15 years; that he kept up a correspondence with his wife and a daughter, informing them that he intended to bring them to the homestead in Nebraska when ready; that there had never been any trouble in the family, and that it was not a case of separation. After presenting this summary of facts, as understood by de-

feudant, she asks the court to presume that her residence was with her husband on the land in controversy, and to reverse a contrary finding of the trial court, as follows: "The court finds that the defendant, Esther E. Morgan, at the time of the conveyance of the premises described in plaintiff's petition, was a non-resident of the state of Nebraska and was a resident of the state of Wisconsin, and, at the time of the death of said Milton M. Morgan, he was a non-resident of the state of Nebraska, being a resident of the state of Kansas, and defendant was a non-resident of Nebraska."

Morgan parted with his title to the land, September 13, 1881, and died January 28, 1902, and, if the finding of the trial court is sustained by the evidence, defendant's claim is defeated by the following statutory provisions, which were in force at the time of her husband's death: "A woman being an alien shall not, on that account, be barred of her dower; and any woman residing out of the state shall be entitled to dower of the lands of her deceased husband, lying in this state, of which her husband died seized." Comp. St. 1903, ch. 23, sec. 20. In giving effect to these provisions this court, in an opinion by Judge MAXWELL in *Atkins v. Atkins*, 18 Neb. 474, said: "This section of the statute seems to have been copied from the statute of Michigan on that subject, the language being the same. The proper construction of the section was before the supreme court of that state in *Ligare v. Semple*, 32 Mich. 438, and it was held that where a husband conveyed lands in that state while his wife was a nonresident thereof she was not entitled to dower therein. In our view this is the proper construction to be given to the language of the statute, and we approve of and adopt it." Other courts have taken the same view of similar statutes. *Bennett v. Harms*, 51 Wis. 251; *Buffington v. Grosvenor*, 46 Kan. 730; *Thornburn v. Doscher*, 32 Fed. 810.

Was the evidence sufficient to sustain the finding that Morgan executed his deed when defendant was a non-resident? Morgan came to Webster county, Nebraska, in

Miner v. Morgan.

1870, or later, represented himself to be a single man, and so described himself in his deed. A witness who lived in the neighborhood and knew Morgan from the time of his arrival until he moved to Kansas did not know he had a wife. Morgan left Webster county in 1888 or 1889 and did not return, except on a visit, and was living in Kansas at the time of his death. He never returned to his family. For nine or ten years after he left defendant and her daughters in Wisconsin they never heard from him, and defendant was never in Nebraska until after her husband died in Kansas. The evidence thus summarized is sufficient to sustain the finding that defendant was a "woman residing out of the state," within the meaning of the statute which limits the dower interest of a non-resident wife to lands of which her husband died seized. *Thornburn v. Doscher, supra.*

If the wife's domicile followed that of the husband, the evidence would still sustain the finding of the trial court, as to defendant's nonresidence, since, in that event, she would be a resident of Kansas, where her husband was residing at the time of his death, and not a resident of this state. It is insisted, however, that defendant's domicile followed that of her husband to Webster county, Nebraska; that her dower interest attached to his land there, before his death, and vested in her the instant he acquired title, and still remains a charge upon the land; that resident widows are protected in such a dower right, and that the statute quoted, in so far as it has been construed in *Atkins v. Atkins, supra*, to deprive a nonresident widow of the same right, is unconstitutional. One provision on which defendant's argument is based appears in both the state and federal constitutions, and declares that no person shall be deprived of property without due process of law, and another is section 25, art. II, of the state constitution, which provides that "no distinction shall ever be made by law between resident aliens and citizens in reference to the possession, enjoyment or descent of property." In other states similar legislation has been upheld

when thus attacked. It rests on the inherent power of the state government over the marriage relation, the means by which land within the state may be transferred by husband or wife, the interest each shall have in the property of the other, the descent or testamentary disposition of realty and the protection of titles. In both Kansas and Wisconsin a statute like our own was sustained. *Buffington v. Grosvenor*, and *Bennett v. Harms*, *supra*. In discussing a statute like the one under consideration, the circuit court of the United States for the district of Oregon said: "It rests with the legislature to say what interest, if any, married persons shall have in the property of each other, as an incident of the relation between them. It may give or withhold dower altogether. Or it may for the security of titles, and the protection of innocent purchasers, provide that a nonresident woman whose very existence is probably unknown within the state, and is practically disavowed by the husband, shall not be entitled to dower of lands which he has disposed of without her concurrence or consent, and ostensibly as a single man." *Thornburn v. Doscher*, 32 Fed. 810. The statute does not violate the constitutional provisions upon which defendant relies, and the construction adopted in *Atkins v. Atkins*, 18 Neb. 474, is followed.

No error appearing in the record, the judgment of the district court is

AFFIRMED.

SARAH MATILDA PETERSON, APPELLANT, V. JOHN ALBERT
BAUER ET AL., APPELLEES.

FILED FEBRUARY 6, 1909. No. 15,833.

1. **Specific Performance: ORAL CONTRACT.** An oral contract to adopt the daughter of a stranger and leave her property by will may be enforced by specific performance, where she has fully performed her part and established the agreement by clear and satisfactory evidence.

Peterson v. Bauer.

2. ———: ———: EVIDENCE. In a suit for specific performance, direct evidence that a testator had made an oral contract to adopt the daughter of a stranger and leave her one-half of his estate at his death may be corroborated by his statements to witnesses of his purpose to do so.
3. Evidence: ANCIENT DOCUMENT. An unacknowledged ancient document coming from doubtful custody may be rejected as evidence, where a credible witness having knowledge of the handwriting of obligor condemned his signature as not genuine.
4. Specific Performance: ORAL CONTRACT: EVIDENCE. In a suit to enforce an oral contract to adopt the daughter of a stranger and leave her property by will, performance on part of plaintiff was properly shown by evidence that she became a member of testator's family when the contract was made, remained 18 years, performed dutifully every detail of her relation during that time, and left with his consent.
5. ———: ———. Whether an oral contract to devise realty shall be enforced by specific performance after it has been performed by plaintiff depends upon the facts and circumstances of each case.

APPEAL from the district court for Cass county: JOHN B. RAPEL, JUDGE. *Reversed with directions.*

T. J. Mahoney, and P. A. Wells, for appellant.

Matthew Gering, contra.

ROSE, J.

This is a suit in equity to enforce an oral contract obligating John H. Bauer to adopt Sarah Matilda Peterson, and at his death leave her one-half of his estate for becoming a member of his family as his daughter and for performing the duties of that relation. The petition states that plaintiff's maiden name was Sarah Matilda Nix, that her mother died in October, 1871, and that the contract was made on plaintiff's behalf by her father, Samuel Nix, in February, 1872, before she was 9 years old, and that thereafter she was never in her father's custody or control, but in the performance of her contract was for 18 years continuously in the home of John H. Bauer, and at all times faithfully and dutifully bestowed upon him

and his wife the service, love and affection of a daughter. In her petition plaintiff further avers that John H. Bauer did not keep his promise to adopt her and leave her one-half of his estate, but at his death left a will by which he bequeathed his personalty to defendant, John Albert Bauer, and devised his realty to him for life, with the remainder in fee to his four minor children, Mabel, Grace, Gertrude and Hazel, defendants. The mother of these children, Lizzie Bauer, wife of John Albert Bauer, and John Albert Bauer, administrator with the will annexed of the estate of John H. Bauer, deceased, are also defendants. The answers of defendants admit that the realty of which John H. Bauer died seized was devised in the manner described in the petition, that defendants John Albert Bauer and Lizzie Bauer are husband and wife, and that Mabel, Grace, Gertrude and Hazel Bauer are their children. Other averments of the petition are denied. Upon the trial below the district court found the issues in favor of defendants and dismissed the suit. Plaintiff appeals.

Was this oral contract made? Was it fully performed on part of plaintiff? Was it violated by John H. Bauer after he had accepted for himself and family the services and devotion of plaintiff in the relation of daughter during 18 years? If the record answers these questions in the affirmative by competent evidence which is clear and satisfactory, a court of equity should decree specific performance. This doctrine has been settled in this state by repeated decisions, and the principal question for determination in this case is whether the making of the contract pleaded by plaintiff has been so established.

Plaintiff contends that the agreement was made during a conversation at the home of her father, who lived in a dugout in Cass county. Three witnesses testified to what was said at the conversation, namely, Mrs. Mary J. Locke, Samuel Smith and George L. Berger. On the issue as to the making of the contract the most direct and positive testimony was given by Mrs. Mary J. Locke, plaintiff's

oldest sister. At the time of the conversation she was a girl 19 years of age. Her mother died in October, 1871, and left her with the care of a number of children, among them plaintiff. Her father's name was Samuel Nix, who made the agreement with John H. Bauer on plaintiff's behalf. When the witness testified, she was a married woman 51 years old. She testified that she remembered the time plaintiff went to live in Bauers' family; that it was in February, 1872; that she remembered the circumstances of plaintiff's going from her father's home to Bauer's, and that Bauer came there, and that she heard a talk between her father and Bauer relative to plaintiff. In this connection the witness was asked: "What did Bauer say?" She answered: "Mr. Bauer said he would take my sister as his own child and care for her and school her, and at his death she should share equally with the boy." In reply to the question, "Share equally in what?" she answered: "His property. What he had." In reply to a further question as to what her father said after Bauer had made these statements, she replied: "He said she could go." On cross-examination she answered a question as to what else Bauer said at the conversation, as follows: "Mr. Bauer said he would like to take her as his own girl and care for her, and she should have half of what he had at his death, as his own child." This testimony was stated in different forms by the same witness. If she actually remembered the substance of what was said during the conversation, the fact would neither be suspicious nor remarkable. What was said about her sister would naturally make a deep impression on her mind. Her mother had only been dead a few months. She was the oldest sister and was left with the responsibility and care of the children. It would not be unusual if the severing of family ties and the terms upon which plaintiff was to leave made a lasting impression on the witness. Plaintiff did not want to go, and a little brother was sent along. Poverty does not make the breaking of the family circle a matter of indifference. Under

the circumstances narrated it would not be too much to believe that the witness will not live long enough to forget what she in fact heard of the conversation relating to her little sister's future. There is no reasonable ground to question her remembrance of the substance of the conversation. If she told the truth, the oral contract was made, as pleaded in the petition. There is nothing in the record, to discredit her as a witness. Her statements show evidence of candor and fairness, and under the circumstances disclosed by the record, there was nothing improbable in Bauer's making the promise to leave plaintiff one-half of his estate at his death. A number of witnesses testified that he wanted a little girl and that he was anxious to get one. Being anxious, he would quite likely offer inducements. Outside of the sentiment and comfort a daughter would bring to his home, he had reasons for anxiety. His wife was a large, corpulent woman, afflicted with rheumatism, and there is proof that, to some extent, she was incapacitated for active work when plaintiff became a member of his family. The making of the contract on the part of John H. Bauer was, therefore, altogether probable.

The testimony of Mary J. Locke, however, does not stand alone. Samuel Smith, who was present at the solicitation of John H. Bauer, also testified that he heard a conversation between Bauer and Nix at the time plaintiff went to live in the Bauer home; that he could not remember the words used, but that the conversation with Bauer was about the division of property, the taking of the girl, and providing for her as one of his own children. On cross-examination he was asked to state his recollection of the conversation, and said: "That it was, he wanted a girl and that he was to provide for the girl as his own." While this evidence of the witness Smith would not alone establish the making of the contract, his testimony corroborates that of Mary J. Locke. In addition, the record is full of the testimony of employees and neighbors of John H. Bauer and others, corroborating the di-

rect and positive evidence of Mary J. Locke, and showing that John H. Bauer understood the agreement to be as pleaded in the petition and that for many years he fully intended to keep his promise. By disinterested witnesses the following facts were shown: Plaintiff was in the Bauer family continuously for 18 years; was known in the neighborhood as "Tilly Bauer," where she was thought to be the adopted daughter of John H. Bauer and wife. They recognized her as their daughter and called her their "girl," "child" or "Tilly." She called them "father and mother" or "papa and mamma." They sent her to school and took her to church. At the age of 16 she was baptized in a church, in which John H. Bauer was deacon, in the name of "Sarah Matilda Bauer." They discussed her prospects of marriage, and objected to an unworthy suitor because plaintiff was a member of the family and would get her interest in their property. They petted her and expressed for her both pride and affection. In addition, John H. Bauer deeded her real estate worth \$1,000 or more, and visited her frequently after she was married, and often took her little boy with him to call upon a neighbor by the name of Mrs. G. W. Rennie, who testified to what he said on one occasion, in the following language: "When he came up there, he said that he took Tilly when she was, I think, about seven years old, to raise her, and he had her adopted, and that she had always worked hard and had done, he said, really more for him than one of his own children could or would; and he said at his death she should come in and share half of everything that he had." Jacob Levy, a justice of the peace in South Omaha, who had formerly visited the home of John H. Bauer, as a peddler, in 1881, testified that both John H. Bauer and his wife told him that plaintiff would be the same as their own daughter, and that they had further said, "After we die she will get her interest in the property." Francis M. Young, a farmer living in the vicinity, stated that John H. Bauer told him that when he died plaintiff should have one-half of what he was worth, and that she should have

Peterson v. Bauer.

just as much as John Albert Bauer. Eliza A. Johnson, a witness who frequently called at the Bauer home, in testifying, said: "He always spoke of them as his two children, his girl and his boy. He was going to divide equally with them; and, 'when he was laid away,' he spoke of her as being cared for, and her being a little lady some day of wealth and money. He always said that."

Plaintiff adduced other evidence to the same effect, but defendants insist that all the testimony of this character is evidence only of a testamentary intention which could be abandoned at any time, and does not prove the contract pleaded by plaintiff. It may be conceded that this testimony tended to show a testamentary intention, but it also corroborates the positive testimony of the witness, Mary J. Locke, to the effect that John H. Bauer took plaintiff into his home under a promise to adopt her, care for her, and leave her one-half of his estate at his death. The corroborating proof also shows that John H. Bauer understood the agreement to be as stated by Mary J. Locke, and that for many years he intended to perform his part of it.

Defendants insist that substantially the same evidence was before this court in *Peterson v. Estate of Bauer*, 76 Neb. 652, and that it was condemned therein as insufficient to show the making of the contract upon which plaintiff asks relief. The answer to this contention appears in an opinion on rehearing, reported in 76 Neb. 661.

To refute the testimony on behalf of plaintiff as to the terms of the contract, defendants introduced the following document: "Louisville, Cass County, Neb., March the 8th A. D., 1873. This is to certify that I, Samuel Nix, do hereby state that I am satisfied for John Bauer to have my little girl Sarah Matilda Nix and adopt her in his family, as his own child, or bound, as he may think best. Said John Bauer is to have control of her until she is eighteen years of age, for which he agreed to do a good part by her, and give her reasonable good schooling and give her a good outfit for housekeeping. Sarah Matilda was born Sept. the 17th A. D. 1864. Samuel Nix. John

Bauer." This paper was admitted in evidence under the rule permitting ancient documents, which are more than 30 years old, to be received in evidence without proof of execution, where they are shown to have come from proper custody. Plaintiff argues that this document should be rejected for the reason it is not shown to have come from proper custody, and also insists that she introduced evidence to show that the signature of Samuel Nix was not genuine, thereby necessitating proof of execution. Defendant John Albert Bauer testified that he found the instrument among his father's papers in the drawer of a small stand in his own bedroom about two weeks after his father's death, and that the stand had been in the room of witness probably a year. The character of the other papers in the drawer was not shown. The witness did not state that his father kept other valuable papers in the drawer. It is shown without contradiction that John H. Bauer did not leave his will, a valuable paper, in the drawer. At the time of testator's death the will was in a safe in possession of Stephen Hulfish, at Wabash. Besides, the evidence is conclusive that John Albert Bauer was not free from artifice in his relations with his father. In testifying he admitted that he once threatened suicide, bought poison, pretended to take it, and allowed a physician to be called, for the purpose of influencing his father to do better by him. The circumstances indicate a doubtful custody. In addition there was no attempt to prove that the signature of Samuel Nix was genuine. On the other hand Francis M. Young testified that he knew Samuel Nix, had transacted business with him, had seen him write, had received a letter from him, and that from these sources of knowledge the name of Samuel Nix on the ancient document was not in his handwriting. Under such circumstances it would be carrying the ancient-document rule too far to consider the paper as authentic without some proof of execution on the part of Samuel Nix. If the ancient document were admitted without question, however, it would not necessarily defeat

plaintiff's recovery. If genuine, it permitted the child to be taken on one or the other of two options. The first option authorized plaintiff's adoption, and the second permitted John H. Bauer to receive her as a bound girl. The facts already narrated show that plaintiff's status in the Bauer family was not that of a bound girl. Plaintiff was treated as an equal, and her standing in the family was that of a daughter. Bauer, therefore, did not accept or act under the second option. With the second option and the qualifying language eliminated by Bauer himself, nothing remained of the instrument except his permission to adopt plaintiff. This permission would have enabled Bauer to carry out his part of the agreement. The only option which Bauer recognized as binding upon him does not contradict the terms of the oral contract pleaded in the petition.

Defendants also direct attention to the testimony of George L. Berger to contradict that of Mary J. Locke. His version of the conversation was stated in one of his answers as follows: "Mr. Bauer said that he wanted to try the girl—take her home and see if he liked her and wanted to keep her. He told Mr. Nix if he kept the girl he would give her a reasonable amount of schooling, clothe her, and if she stayed with him until she married or was of age, he would give her a reasonable outfit to go to keeping house." The witness Berger was present at the conversation by request of John H. Bauer, and was a half or full brother of defendant John Albert Bauer, there being a conflict in the evidence as to their relationship. On the question in issue Berger's evidence contradicts that of the other two witnesses present, and is also at variance with later statements of John H. Bauer himself, that at his death plaintiff should have one-half of his estate. More than 30 years after the conversation Berger testified to details of no importance in such a glib and reckless manner as to discredit his testimony. He had no extraordinary interest or obligation to arrest his attention or impress his memory. The language in which he at-

tempts to reproduce what John H. Bauer said bears a remarkable resemblance to the style accredited by defendants to Samuel Nix in the foregoing ancient document, which was not in existence at the time of the conversation. This similarity in language, after the lapse of more than 30 years, can be accounted for on the supposition that the witness refreshed his memory from the ancient document, instead of stating his recollection of what he actually heard. His testimony does not discredit that of Mary J. Locke.

It is also argued by defendants that John H. Bauer's reputation for honesty and fair dealing, and the solemn will and testament by which he excluded plaintiff from sharing his estate at his death, ought to have great weight in the determination of this case. The provisions of testator's will were at variance with his statements and intentions as expressed by him to many witnesses during the 18 years plaintiff lived in the Bauer family. Moreover, the record furnishes no reason to question the honesty or truthfulness of plaintiff, who was permitted to testify to John H. Bauer's statements of his own obligations and intentions in 1890, and to show they were not then as expressed in his will. The opportunity for plaintiff to testify to such facts was given when defendants introduced proof that he deeded her real estate worth \$1,000 or more. In relating the circumstances of the transfer plaintiff testified that John H. Bauer in substance said he had given her the property because he was having to spend much on Albert; was going to take him to Canada; wanted plaintiff to stay on the farm until he returned. Albert had gotten himself and Bauer into so much trouble, he was having to dispose of his property and go away, and wanted her to have the property transferred; mentioned the terms on which she was taken into the family; would give her half of what he had at his death. This testimony and the direct and corroborating evidence, to the effect that John H. Bauer took plaintiff into his family under a promise to leave her one-half of his estate at his death,

cannot be overturned by his reputation for honesty, nor by the solemn instrument through which he violated his promise, after having received under it for himself, his invalid wife and John Albert Bauer the benefit and comfort of plaintiff's faithful service and affection during 18 years of the best part of her life.

Defendants further argue that plaintiff has not fully performed her part of the oral contract pleaded in her petition. Before she was 9 years old she was taken from her father, brothers and sisters to the home of John H. Bauer and thereafter was a member of his household continuously for 18 years. When she arrived the family consisted of John H. Bauer, his wife, defendant John Albert Bauer and plaintiff. There is proof that, to some extent, Mrs. Bauer was incapacitated for work at the time plaintiff first went to the Bauer home. Five years later Mrs. Bauer was practically an invalid, requiring a great deal of care and attention during the rest of her life. She died August 7, 1886, and during those years plaintiff waited on her and at times was her nurse. She dressed her, watched by her at night, rubbed her for rheumatism, and otherwise ministered to her wants. In addition, she was housekeeper and cook for the family, washed and ironed, did chores on the farm, milked cows in summer and winter, churned, took care of the chickens, worked in the garden, and performed these and other services and duties cheerfully. Witnesses testified that Mrs. Bauer had praised plaintiff's conduct and work, and that John H. Bauer repeatedly boasted to the neighbors and others of her being a good girl, and of her taking care of the home, and of her discharging all her duties faithfully and cheerfully. No witness for any of the parties testified to a complaint on the part of either John H. Bauer or his wife as to the behavior of plaintiff or of the manner in which she fulfilled her obligations to them. Plaintiff's relation with the Bauer family terminated after John Albert Bauer came home with a wife. Of this incident a witness said that John H. Bauer made a statement to the

Peterson v. Bauer.

effect plaintiff should leave if John Albert Bauer returned after an absence in Canada, and that she could not be blamed for refusing to live in the house with him and his wife. Plaintiff remained in the Bauer family a number of years after Mrs. Bauer's death, 9 years longer than she could be bound by the contract made by her father in her behalf, and 9 years after she had reached the age when a parent could retain the custody and control of a daughter against her will. When plaintiff severed her connection with the Bauer family her right to do so was recognized by John H. Bauer. The contention of defendants that the contract pleaded in the petition has not been fully performed by plaintiff is not sustained by the record. That John H. Bauer broke his promise to leave plaintiff at his death one-half of his estate, after having received the benefit of performance on her part, is also established by the evidence.

Reference cannot be made to all the evidence without making the opinion too long, but each item of proof on both sides has been examined in its relation to every part of the record. The character and effect of the evidence described will not furnish a measure for other cases. The direct evidence of the making of the contract might prove wholly insufficient when given by other witnesses in a case presenting different corroborating facts and circumstances. *Kofka v. Rosicky*, 41 Neb. 328. Most of the testimony was submitted in the form of depositions, and for that reason the trial court was deprived of the usual advantage over this court in determining the credibility of witnesses.

The conclusion is that the oral contract was made as pleaded in the petition, that it has been fully performed by plaintiff, and violated by defendants' testator. The judgment of the district court is therefore reversed and the cause remanded to the court below, with directions to enter a decree in favor of plaintiff for the specific performance of her contract as prayed in her petition.

REVERSED.

FAWCETT and ROOT, JJ., having been of counsel in the case, did not sit.

IN RE ESTATE OF JOHN MANNING.

THOMAS BONACUM, BISHOP, APPELLANT, V. JOHN MANNING, JR., ET AL., APPELLEES.*

FILED FEBRUARY 6, 1909. No. 15,497.

Descent and Distribution: JURISDICTION. The district court is without original jurisdiction to distribute the funds of an estate of a deceased person.

APPEAL from the district court for Furnas county:
ROBERT C. ORR, JUDGE. *Reversed.*

Perry & Lambe, for appellant.

W. S. Morlan, John T. McClure and J. F. Fults, contra.

FAWCETT, J.

This is an appeal from a judgment of the district court for Furnas county, determining the rights of the beneficiaries under the will of John Manning, deceased, and ordering a distribution of the moneys in the hands of the administrator of said estate among the beneficiaries named in said will. We have made a careful examination of the record, and are unable to find anything showing that the county court was ever called upon to construe the will, or that it ever made any order of distribution of the moneys in controversy. The only thing in the record even tending to show that any steps were ever taken in the county court to construe the will or make distribution of the funds is the written application of the four children of John Manning, deceased, asking the court to declare certain provisions in the will void and to make distribution of the estate. This application was verified June 4, 1906, by John T. McClure, as attorney for the applicants, but there is nothing in the record to show when the application was filed in the county court, nor is there anything to show that the county court ever acted upon the appli-

* Rehearing allowed. See opinion, 85 Neb. —.

cation, nor does the record show an appeal by any of the parties from any order which the county court may have made, if at all, upon such application. The record fairly shows that all of the estate of John Manning, deceased, with the possible exception of one lot in Arapahoe, has been converted into money, and that the money is now in the hands of the executor. Such being the fact, the county court alone has original jurisdiction to determine the question as to who is entitled to receive such moneys, and in what proportions, and to order distribution. The district court has no original jurisdiction in such a case (*Reischick v. Rieger*, 68 Neb. 348), and can only take jurisdiction upon an appeal regularly prosecuted after an adjudication of the question in the county court. It is clear therefore that, so far as the record before us discloses, the district court was without jurisdiction to enter the decree complained of.

While it is unnecessary to say anything further in disposing of this case, we deem it prudent to suggest that no order distributing the funds of this estate should be made until due notice has been given to all persons interested of the application for such distribution. No such notice is shown to have been given. We do not think there is any authority in the court to appoint a guardian *ad litem* for an insane party until such party has first been served with all due process. Furthermore, we notice in the record some stipulations that were signed, making certain allowances for attorneys' fees and other expenditures. A guardian *ad litem* has no authority to make any such stipulations. At every stage of the proceedings it is the duty of a guardian *ad litem* to insist upon strict proof of everything which in any manner affects the rights of his ward. While we do not so decide, an examination of the record before us leads us to strongly suspect that all of the proceedings of this case since the filing of the will for probate have been without any binding force upon Ellen Manning, insane. It is possible that if all of the proceedings in the county court were before us, including

proof of service of the proper notices upon Ellen Manning, insane, they might show the legality of what has thus far been done, but the record now before us leads us to seriously doubt it. Unless it can be made to appear to the district court, by a proper transcript from the county court, that the county court had jurisdiction of the parties in interest, and has, after due and proper notice, adjudicated the questions presented, and that an appeal has been properly prosecuted from the judgment of the county court to the district court, it is the duty of the district court to dismiss this action or appeal, as the case may be.

The judgment of the district court is therefore reversed and the cause remanded for further proceedings in harmony herewith.

REVERSED.

SADIE BERGERON, APPELLEE, V. MODERN BROTHERHOOD OF AMERICA, APPELLANT.

FILED FEBRUARY 6, 1909. No. 15,500.

1. **Insurance: PART PAYMENT: ACTION FOR REMAINDER.** Where an insurance company, after the death of one to whom it has issued its policy or beneficiary certificate, sends its agent to the beneficiary for the purpose of adjusting the claim of said beneficiary under such policy, and said agent obtains from the beneficiary a surrender of such policy with a receipt on the back thereof signed in blank by the beneficiary, under an agreement that the company will pay such beneficiary the full amount of the policy within a few days or return such policy to said beneficiary, and the company retains possession of said policy, but remits to the beneficiary only a portion of the amount named therein, the amount so paid will be treated as a partial payment only, and the beneficiary may maintain her action for the balance called for by said policy.
2. ———: **LIABILITY ON POLICY.** And in such case the fact that the company, after obtaining possession of the policy, fills in the blank receipt on the back thereof for less than the amount agreed upon, will not relieve the company of its full liability under said agreement.

3. ———: ARGUMENT: RATIFICATION: WAIVER OF DEFENSES. And in such a case the retention of the policy by the company will be treated as a ratification of the agreement made by its agent, under which it obtained possession of said policy, and as a waiver of all defenses which it may have had on account of anything which had occurred prior to such adjustment by said agent.

APPEAL from the district court for Douglas county:
LEE S. ESTELLE, JUDGE. *Affirmed.*

Isaac E. Congdon, for appellant.

Greene, Breckenridge & Matters, contra.

FAWCETT, J.

The petition, among other things, alleges that on the 22d day of November, 1902, defendant issued to Philip Bergeron, husband of plaintiff, a beneficiary certificate upon the life of said Philip Bergeron, for the benefit of plaintiff, in the sum of \$1,000; that on October 22, 1905, said Philip Bergeron departed this life; that plaintiff furnished defendant due proofs of death; that after the death of Philip Bergeron defendant, through one of its directors, one Frank H. Scott, after attempting by numerous threats set out in the petition to obtain a settlement of the claim for a sum much less than the face of the policy, finally agreed with plaintiff that, if she would surrender to him her said certificate, defendant would pay her the face thereof, \$1,000, in cash; that, relying upon his promise as a director and agent of the defendant, plaintiff signed a receipt in blank, and delivered to said Scott the beneficiary certificate; that shortly thereafter defendant sent plaintiff the sum of \$250, but has failed to pay the other \$750, for which last named sum, together with interest, plaintiff prays judgment. The defendant in its answer, after setting out numerous reasons why it thinks it should be relieved from paying plaintiff's demand, which we do not deem it necessary to set out, alleges that, "in order to save to its membership expense and annoyance through

litigation, authorized and directed a settlement with Sadie Bergeron, the plaintiff, in and for the sum of \$250 in full of any and all demands which she might assert against the defendant under and by virtue of said benefit certificate or any contract between said Philip Bergeron and the defendant, and to that end empowered one of its then directors, Frank H. Scott, to make said settlement on defendants' behalf with said Sadie Bergeron. On the 3d day of February, 1906, in the city of St. Louis, state of Missouri, said Sadie Bergeron, the plaintiff, surrendered said benefit certificate and delivered the same to defendant, and signed a receipt on the back thereof in words and figures as follows: 'Received from the Modern Brotherhood of America, of Mason City, Iowa, through the proper officers of this lodge No. — two hundred and fifty (\$250) dollars in full payment of the amount due the beneficiaries under the within benefit certificate No. 48920, issued to Philip Bergeron now deceased, proof of claim having been filed with said brotherhood on the 13th day of November, 1905. Dated at St. Louis this 3d day of November, 1906. Sadie Bergeron, Beneficiary. Witness: Frank H. Scott.' Immediately thereafter the defendant paid to said Sadie Bergeron the sum of \$250, as named in and called for by said receipt, in full payment of the amount due to her under and by virtue of said benefit certificate. The plaintiff received said sum of \$250 in full payment of any and all amounts due to her under and by virtue of said benefit certificate, and receipted to the defendant for the same; and she has at all times retained the same, knowing that it was paid her in full satisfaction, and has at no time returned or offered to return the same or any part thereof." The reply, so far as it applied to the alleged settlement set out by defendant, is a general denial.

Plaintiff testifies positively that at the time Mr. Scott, director of defendant, called on her in St. Louis he at first attempted to obtain a settlement from her for the sum of \$250, which amount he later raised to \$500, both of which offers she declined; that he came to her house at

9:30 in the morning and remained there until the hour of midnight, declaring that he would not leave until he had obtained a settlement; that he was so persistent in staying right with plaintiff that neither of them ate either lunch or dinner that day; that he even went with plaintiff to a dentist's office, where plaintiff had an appointment, and remained with her during all of the time she was there; that he subsequently said to her that he must obtain a settlement that night; that he finally agreed with her that, if she would deliver to him the policy and sign the blank space on the back of it, he would have the company send her the full \$1,000 by the following Tuesday or return her the policy; that, relying upon such promise, she signed the blank receipt on the back of the policy and delivered it to him, whereupon he took his departure; that she subsequently received the sum of \$250, and no more, and that defendant never returned the policy; that when she signed the receipt on the back of the policy she signed it in blank, except as to the date, which she required him to insert before signing. No attempt is made by the defendant to contradict any part of this testimony by the plaintiff. It stands in the record entirely uncontradicted. Nor is there any attempt at denial, either in the pleadings or the evidence, of the authority of Scott to make the settlement pleaded in the petition and above referred to.

When both sides rested, plaintiff moved the court to direct a verdict in her favor for the balance due of \$750, with interest, and defendant moved the court to direct a verdict in favor of the defendant. The court overruled the motion of the defendant, sustained plaintiff's motion, and directed a verdict for the plaintiff for the said sum of \$750, with interest, upon which judgment was subsequently rendered. The district court was clearly right. When the defendant made the adjustment testified to by plaintiff, and retained the policy which it had obtained from her in the manner detailed in her uncontradicted testimony, it waived all defenses which it may have had on account of anything which had occurred prior thereto.

Hart v. Knights of the Maccabees of the World.

It could not retain the policy without ratifying the agreement of Scott under which it obtained it. The above holding being decisive of the case, the other matters pleaded and discussed will not be considered.

The judgment of the district court is right, and is

AFFIRMED.

**CLARA HART, ET AL., APPELLEES, V. KNIGHTS OF THE
MACCABEES OF THE WORLD, APPELLANT.**

FILED FEBRUARY 6, 1909. No. 15,417.

1. **Insurance: PROOF OF LOSS: CONCLUSIVENESS.** Statement in, the proof of loss, as to the cause of the death of an insured, may be contradicted on the trial of an action on the policy of insurance, unless the usual elements of equitable estoppel are present.
2. ———: **ACTION: EVIDENCE.** A fraternal insurance company cannot have the benefit of its by-laws and amendments thereto, in defending against a death claim, unless certified copies of such by-laws and amendments have been filed with the auditor of public accounts.

APPEAL from the district court for Dodge County:
CONRAD HOLLENBECK, JUDGE. Affirmed.

Hainer & Smith and D. D. Aitken, for appellant.

Grant G. Martin and Courtright & Sidner, contra.

DUFFIE, C.

November 14, 1902, William F. Hart became a member of a subordinate lodge of Maccabees, known as the "Hooper Tent, No. 75," and on that date there was issued to him the beneficial certificate sued on in this action. In its answer the defendant alleges that at the time of securing admission into the Maccabees section 430 of its laws was in force, and is as follows: "Section 430. No benefit shall be paid on account of the death or disability

of any member while engaged in a mob, riot or insurrection, * * * or who may be injured or killed in any quarrel, controversy or any fight in which such member may be the offending party." The answer further alleges that after Hart became a member, and in 1904, the Maccabees revised their laws and enacted the following sections: "Section 404. QUARREL OR FIGHT. No benefit shall be paid on account of the death or disability of any member who has been killed or injured in a quarrel, controversy or fight in which such member is the offending party." "Section 405. VIOLATING LAW. No benefit shall be paid on account of the death or disability of a member who dies or becomes disabled in consequence of a violation or attempted violation of the laws of any state, district, territory or province, or in consequence of resisting arrest." Sections 372 and 373 of the laws of the order, relating to proofs of death, are set out in the answer, and it is then alleged that Hart came to his death while engaged in a quarrel in which he was the offending party, and a copy of the finding of the coroner's jury is set out in the answer, showing that Hart "came to his death by a bullet from a revolver of 45 caliber in the hands of one Frank Owens, and was fired in self-defense, and for the protection of his mother, and we, the jury, believe the act was justifiable." From a judgment in favor of the plaintiffs the defendant has appealed.

It is insisted by the defendant that as proofs of death made by the plaintiff show that Hart was killed while engaged in an altercation, and that his killing was justified by the circumstances, the evidence which established his death also established that his death occurred under such circumstances as exempted the defendant from any liability on account thereof, and that the defendant's motion for an instructed verdict in its favor should have been sustained.

Relating to the proof of death, it is clearly shown that it was prepared by the officers of Hooper Tent, No. 75, and that Mrs. Hart, who signed it, had little or no knowledge

of what it contained, and no knowledge of the finding of the coroner's jury being made a part thereof. The general rule appears to be that the burden of proving that death ensued while deceased was engaged in some act violative of the rules of the order is on the defendant company, though the proof of death offered by the plaintiffs may recite facts from which such violation of the rules may be presumed. In *Supreme Tent, K. M. W., v. Stensland*, 206 Ill. 124, the by-laws of the defendant company provided that, if the insured committed suicide, whether he was sane or insane at the time, no benefit should be paid, and the proofs of death contained a statement taken from the verdict of the coroner's jury that the cause of death was suicide by strangulation. In that case the defendant company insisted that the plaintiff and beneficiary was estopped from showing that death arose from any cause except that shown in her proofs made to the company. The court said. "While there may be some slight authority for the contention of appellant, we are convinced that reason and the great weight of authority are with the rule which permits the statements in the proof of loss to be contradicted on the trial, unless it appears that the usual elements of equitable estoppel are present." A further statement of the court in that case describes 'almost the exact condition relating to the proofs of death in the case we are considering, and is as follows: "The rule insisted upon by appellant is that before the statements in the proof of loss can be contradicted the plaintiffs must show that they were made by mistake or produced by fraud. The evidence shows that the plaintiffs knew nothing as to the cause of death. * * * She swears that the agent of the insurance company prepared the proof of loss and that she did not read it before she signed it. * * * But even granting that she knew and comprehended, at the time, that the proof of death contained the statement that the death was from suicide, still no estoppel arises, for the reason that the statement that the death resulted from suicide by strangulation was a mere opinion." See,

also, *Cluff v. Mutual Benefit Life Ins. Co.*, 99 Mass. 318; *Bankers Life Ass'n v. Lisco*, 47 Neb. 340; *Dougherty v. Pacific Mutual Life Ins. Co.*, 154 Pa. St. 385.

The defect in the defendant's evidence to sustain its defense lies back of this, and arises from its failure to show that the by-laws of the order, relied on as a forfeiture of the certificate issued to the deceased, were in force in this state. Section 6656, Ann. St. 1907, is in the following words: "Every such society shall file with the auditor of public accounts a copy of its constitution and by-laws duly certified to by the secretary or corresponding officer, and before any amendment, change or alteration thereof shall take effect or be in force a copy of such amendment, change or alteration, duly certified to by its secretary or corresponding officer, shall be filed with the auditor of public accounts." It appears from the deposition of John L. Pierce, deputy auditor of the insurance department of this state, that copies of the laws of the Maccabees, revised and amended July, 1904, were filed in the office of the auditor of state December 16, 1904. The certificate of the supreme record keeper of the Knights of the Maccabees is a printed form, and the signature of the grand record keeper is not in his own handwriting, but is also printed. The certificate bears the impression of the seal of the order, but contains no venue, which may not be a fatal defect; but as we construe it, the statute above copied requires the certificate to be under the hand of the secretary, as well as under the seal of the order. Attached to the deposition of the supreme recorder of the order, which was read in evidence by the defendant, was a printed book, entitled, "Revised Laws of the Knights of the Maccabees of the World, Edition of 1901," and the grand record keeper testifies that said pamphlet contains a true copy of the laws of the order in force November 8, 1902, when Hart was admitted to membership. There is no evidence coming from the grand record keeper, or from the office of the auditor of state, or from any other source, that these laws were ever filed in the office of the auditor of state,

or that the defendant order had taken any steps which would make their laws competent evidence in this state in defense of a suit brought on a certificate of membership.

It is familiar law that no presumption will be indulged in favor of a forfeiture, and the burden of proof, where the society seeks to escape liability on that ground, is upon the society. An allegation in the petition that all the conditions in the contract were fulfilled by the assured, even when denied by the answer, does not impose on the plaintiff the burden of proving that each condition was fulfilled; but, when the breach of any particular condition is relied on as a defense, the burden of proving it is upon the society. 29 Cyc. 232. The certificate issued to the deceased contained no condition upon which a forfeiture may be declared, and the conditions relied on by the defendant to establish a forfeiture are set out only in the laws of the order. It was necessary, therefore, in order to establish its defense, that the laws of the society should be introduced in evidence, and to further show that they were in force in this state. As we have seen, none of these laws or regulations were in force in this state, because no copy of such laws were on file with the auditor of state in 1902, when the deceased became a member, and the revised laws of 1904, which were filed with the auditor, were not properly certified. This was fatal to the defense offered. *Knights of the Maccabees of the World v. Nitsch*, 69 Neb. 372.

On the record before us, the judgment appealed from is the only one which the district court was authorized to enter, and we recommend its affirmance.

EPPERSON and GOOD, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

ROSE, J., concurring.

Payment of the death claim in this case was resisted on the ground that the assured came to his death while en-

gaged in a quarrel in which he was the aggressor. In the certificate itself this was not a condition of forfeiture. The defense rests on a by-law found in a pamphlet in the office of the auditor of public accounts. The pamphlet containing the by-law is not authenticated by the signature of any officer of the society, though the name of an officer is printed with a purported certificate which any printer can duplicate. The statute quoted in the opinion of the commissioner declares that such society shall file with the auditor of public accounts a copy of its constitution, by-laws and amendments, "duly certified to by its secretary or corresponding officer." Within the meaning of this statute the words "duly certified" mean more than a printed certificate and printed name of an officer. The purpose of that term in the law is to require a means of authentication by a responsible officer of the society. This purpose might be defeated by recognizing the printed name of the officer as sufficient. The statute requires a public record which affords the means of identifying the genuine by-laws. When members and beneficiaries are bound by rules which may result in the forfeiture of their insurance, the law protects them by requiring a certificate over the signature of a responsible officer. To hold that printed names may be used in making such certificates for the benefit of the public would take away the safeguard of authentication and weaken official responsibility in disregard of the statute. In the sense used, "duly certified" means attested or identified in writing by the signature of the secretary or corresponding officer. *State v. Brill*, 58 Minn. 152; *Kipp v. Dawson*, 59 Minn. 82; *State v. Schwin*, 65 Wis. 207. In *State v. Gee*, 28 Or. 100, the court said: "To 'certify' means simply 'to testify in writing'; 'to make a declaration in writing.'—Webster. It is not even necessary that the word 'certify' or 'certified' be used in the certificate, but it is sufficient if the required statutory fact be made known in writing under the hand of the officer."

The commissioner in his opinion correctly interprets and applies the statute.

IN RE ESTATE OF RHODA GREENWOOD.

WILLIAM J. ARMSTRONG ET AL., APPELLANTS, v. JOHN T. GREENWOOD, EXECUTOR, APPELLEE.

FILED FEBRUARY 6, 1909. No. 15,448.

Executors and Administrators: FINAL ACCOUNT: OPENING. After making his final report, and securing an order approving the same and discharging him from his trust, an executor filed a petition to permit him to account for mortgages which he held in a trust capacity under the will, whereupon legatees objected in general terms to his discharge as executor, for the reason that the charges made by the executor are excessive and not according to law. *Held*, That such objections were insufficient to require the county court to reopen the former proceedings for the purpose of reviewing the expenditures and charges contained in the final report of the executor.

APPEAL from the district court for Otoe county: PAUL JESSEN, JUDGE. *Affirmed*.

John C. Watson, for appellants.

Pitzer & Hayward, contra.

EPPERSON, C.

The appellee was executor of the last will of his deceased wife, and was also by the will appointed trustee of certain property of which his and the decedent's son, an incompetent, was the beneficiary. He filed his petition for discharge and his final report, in which he alleged the expenditure of various sums of money, the greater part of which seems to have been as trustee. No objections were made, and on February 20, 1906, he secured an order approving his final report and discharging him as executor. In July following he filed a petition in the county court, alleging an omission from his final report of mortgages, aggregating \$3,000, which he had received in his capacity as trustee. He also alleged the expenditure of \$314.85 since the order of his discharge. He

prayed that he be permitted to add said mortgages to his final report, and that he be credited with the items of expenditure and certain other funds which he had delivered to his successor in the trust estate. The appellants, who were given a remainder in property disposed of in the residuary clause of decedent's will, then filed objections "to the discharge of the executor herein, Joseph T. Greenwood, for the reason that the charges made by the said executor are excessive and not according to law." No other objections were made, and the county court permitted the order of February 20 to be opened for correction and modification, for the reasons set forth in the executor's petition, and for no other purpose.

The objections filed by the appellants to the discharge of the executor do not specifically assail the items of expenditure shown by the reports of the executor filed prior to February 20, 1906; nor does it appear from the instrument itself that the appellants attempted to assail such expenditures, all of which had been previously reported and allowed upon a final hearing, from which no appeal was taken. The executor himself only prayed that he might be permitted to report property previously omitted. In such cases we think that the county court has a discretion to say to what extent he should inquire into the former proceedings had. Had the legatees assailed the former final report of the executor, and alleged sufficient reasons for not assailing the same at the time of the hearing thereon, the court should consider the same and correct any errors made. But under the circumstances of the case, wherein such expenditures were not specifically questioned in any objections filed, and no reason shown for not previously objecting, we cannot say that the county court erred in confining his inquiries to the matters presented in the application of the executor. Upon appeal in the district court the issue was confined to the matters tried by the county court. No attempt was made to defeat the later expenditures alleged by the executor, which were proved by the evidence.

Finding no error in the record, we recommend that the judgment of the lower court be affirmed.

DUFFIE, GOOD and CALKINS, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

J. MCCAULEY V. STATE OF NEBRASKA.

FILED FEBRUARY 6, 1909. No. 15,843.

1. **Licenses: VEHICLES USED FOR HIRE.** A city charter conferring upon the council power "to levy and collect a license tax on * * * hacks, drays, or other vehicles used for pay within the city, and to prescribe the compensation for the use of such hacks, drays and other vehicles," is insufficient to authorize the city council to exact a license tax from persons the regulation of whose compensation is not permitted.
2. ———: ———. The owner of wagons kept by him for the purpose of renting them to various firms under monthly contracts, each wagon being kept for the exclusive use of the firm contracting for it, the same being under the direction and control of the various firms having monthly contracts for said wagons, and who does not hold himself out as ready to serve any person who may have goods or merchandise to transfer, is not the owner of vehicles used for pay, nor is his compensation subject to control by the city council within the meaning of the charter provision above quoted.

ERROR to the district court for Douglas county: WILLIS G. SEARS, JUDGE. *Reversed.*

Charles C. Montgomery, for plaintiff in error.

Herbert S. Daniel, contra.

EPPELSON, C.

The plaintiff in error was prosecuted in the police court in the city of Omaha upon a complaint charging that the

plaintiff in error did "hire out and keep for use and hire, and caused to be kept for use and hire for the transportation of goods, a wagon and vehicle without first having obtained a license for said vehicle so used," etc. On appeal to the district court from a judgment of conviction he was again convicted. A trial was had upon an agreed statement of facts, in which it appeared that the plaintiff in error as manager of a corporation maintained and kept horses and wagons which were engaged by various firms under monthly contracts for hauling, each wagon being kept exclusively for the firm contracting for it. The drivers and men employed upon the wagons were in the employ of the transfer company, and the vehicles and men driving them were under the direction and control of the various firms having monthly contracts for said wagons. The wagons are never kept at any of the public stands designated by the board of fire and police commissioners for vehicles licensed in chapter 94 of the ordinances of the city of Omaha. The wagons have painted on them the names of the firms which have the monthly contracts for them, and are never used for the carrying of single loads of goods, nor in any other way except in the ordinary business of delivering merchandise at contract rates by the month.

The ordinance under which the plaintiff in error was arrested declares it unlawful for any person to hire out or keep for use or hire for the transportation of goods, merchandise, fuel, building material, or any other article or thing, any dray, cart, wagon or other vehicle so used. A penalty for a violation thereof is imposed. The provision of the chapter which authorized the ordinance in controversy is section 7677, Ann. St. 1907, as follows: "The mayor and council shall have power to levy and collect a license tax on * * * hacks, drays, or other vehicles used for pay within the city, and may prescribe the compensation for the use of such hacks, drays and other vehicles." At the outset it may be observed that the power vested in the city council is a police power, and

not one giving authority to levy taxes. The charter provision is evidently intended for the purpose of protecting the public, and for this purpose requiring or authorizing the regulation of the business engaged in by draymen or hackmen or others, who, in fact, are common carriers. The evidence is insufficient to show that the plaintiff herein was a common carrier. There can be no doubt but that he is engaged in the business of renting wagons and teams to persons having goods to haul, and that he receives a compensation or profit therefor. But he does not hold himself out as ready to serve any person who may have goods or merchandise to transfer. He engages only to rent or hire his wagons and teams by the month to persons of his own selection, who may choose to accept his terms and enter into a contract with him. We are convinced that the business which he conducts is not such as would authorize the city council to prescribe a compensation which he is entitled or required to receive from his patrons. In *State v. Robinson*, 42 Minn. 107, it was held that the provision in a charter authorizing the city council "to license and regulate hackmen, draymen, expressmen, and all other persons engaged in carrying passengers, baggage, or freight, and to regulate their charges thereon," applies only to those who are engaged in business as carriers of persons or property for hire, and not to those who, not being engaged in such business, merely hire out teams and vehicles to those who have property to transport, the hirer himself using and controlling the team and vehicle." The facts in the above case were very similar to the facts as stipulated in this case, and the provision of the city charter upon which the ordinance was founded, although worded differently, is as comprehensive as that of the Omaha charter.

A former charter of the city of Chicago conferred power upon the city council as follows: "To license, regulate and suppress hackmen, draymen, carters, porters, omnibus drivers, cabmen, carmen, and all others * * *

who may pursue like occupations, with or without vehicles and prescribe their compensation." Although the power is expressed in more specific language than that given to the city of Omaha in its charter, yet the construction placed upon the Chicago charter in *Farwell v. City of Chicago*, 71 Ill. 269, may well apply to the Omaha charter. Therein the court said: "The spirit of the ordinance is to bring the class of carriers therein named under the police regulations of the city. It is designed to operate upon those who hold themselves out as common carriers in the city for hire, and to so regulate them as to prevent extortion, imposition and wrong to strangers, and others compelled to employ them, in having their persons or property carried from one part of the city to another. This is a rightful exercise of the police power."

It is incompetent for a municipality to prescribe rates of carriage upon vehicles used as the plaintiff in error uses his. The authority to license is qualified by that clause of the charter provision which permits the city council to fix the compensation. In other words, the city council has no authority, under the charter provision depended upon, to exact a license fee from persons the regulation of whose compensation is not permitted. The ordinance expressly avoids fixing a compensation for the business engaged in by the plaintiff in error, and it is not even contended by the city that the council could exercise such power. Under a charter provision authorizing a license tax to be imposed upon vehicles conveying loads, and to prescribe the rates of carriage, it was held that "to license and to prescribe the rates of carriage, alike apply to the vehicles named; so, it is only such vehicles which are in contemplation as the subjects of license, in respect to which the rates of carriage are to be prescribed." *Joyce v. City of East St. Louis*, 77 Ill. 156. Plaintiff in error did not keep wagons used for hire within the meaning of the charter. The contracts under which he was employed did not apparently make him a bailee of the property transported upon his wagons. His compensa-

tion was in the nature of a rental, and not a charge to be determined upon the circumstances attending each transfer made.

We are satisfied that the judgment of conviction was wrong, and recommend that it be reversed and this cause remanded for further proceedings.

DUFFIE, GOOD and CALKINS, CC., concur.

By the Court: For the reasons given in the foregoing opinion, this cause is reversed and remanded to the lower court for further proceedings.

REVERSED.

CASS COUNTY, APPELLANT, v. SARPY COUNTY, APPELLEE.

FILED FEBRUARY 6, 1909. No. 15,761.

Counties: BRIDGE REPAIRS: "RECOVERY BY SUIT." The words "recovery by suit," as used in the proviso of section 6147, Ann. St. 1907, include a suit instituted by an appeal from the disallowance of a claim by a county board.

APPEAL from the district court for Sarpy county: LEE S. ESTELLE, JUDGE. *Reversed.*

C. A. Rawls, for appellant.

Ernest R. Ringo and John F. Stout, *contra.*

GOOD, C.

This appeal arises out of the disallowance by the county board of Sarpy county of a claim against said county filed by the county of Cass for one-half of the cost of certain repairs to a bridge over the Platte river between said counties. The county board of Cass county had previously requested the county board of Sarpy county to enter into a joint contract for the repair of the bridge. The county board of Sarpy county refused to enter into such a con-

Cass County v. Sarpy County.

tract or to have anything to do with making the repairs. Cass county then let the contract and caused the repairs to be made and paid the contractor therefor. The claim which it filed with the county clerk of Sarpy county was for one-half of the cost of the repairs. After the disallowance of the claim by the county board of Sarpy county, Cass county appealed to the district court, and set forth the facts in a petition filed therein. The defendant filed an answer, and the plaintiff replied thereto. The cause came on for trial, and a jury was impaneled. The defendant objected to the introduction of any evidence, upon the ground that the district court had no jurisdiction. The objection was sustained and judgment of dismissal entered. Plaintiff has appealed.

Plaintiff's right to recover is founded upon sections 6146, 6147, Ann. St. 1907. The latter part of section 6147 is as follows: "Provided, that if either of such counties shall refuse to enter into contracts to carry out the provisions of this section, for the repair of any such bridge, it shall be lawful for the other of said counties to enter into such contract for all needful repairs, and recover by suit from the county so in default such proportion of the cost of making such repairs as it ought to pay, not exceeding one-half of the full amount so expended." Defendant contends that, under the proviso quoted, recovery can be had only in an original action in court, and that said proviso does not require the claim to be submitted to the county board for allowance or disallowance, and that the district court could not therefore acquire jurisdiction of the action by an appeal from the county board. It will be conceded that, if the county board was without jurisdiction to pass upon the claim, the district court could not by appeal acquire jurisdiction, and, on the other hand, if the county board had jurisdiction to pass upon the claim, the district court acquired jurisdiction by the appeal. The determination of this case must rest upon the construction placed upon the proviso to section 6147 above quoted.

The word "suit" has received many and varied definitions. It has been defined as a proceeding in a court of justice for the enforcement of a right; an action or process for the recovery of a right or claim; the prosecution or pursuit of some claim, demand or request. Ordinarily the term "suit" is applied to any proceeding in a court of justice by which one pursues that remedy which the law affords him, but it is not always essential that the proceedings should be originally instituted in a court. See 7 Words & Phrases, 6769. In *Gurnee v. Brunswick*, 11 Fed. Cas. 117, it was held that the filing of a claim before a county board was not the commencement of a suit, but that the filing of an appeal in court from an order of the county board allowing or disallowing a claim was the commencement of a suit. We are of the opinion that in the strict sense of the term the filing of a claim against a county with the county clerk is not the commencement of a suit, but is rather a preliminary proceeding that may ripen into a suit. Upon the presentation of a claim against a county to a county board, if the claim is allowed, there is no occasion for further proceeding. If the claim is disallowed, the law permits an appeal to be taken to the district court. The lodging of such appeal in the district court is a proceeding instituted in a court of justice for the enforcement of a right; it is the prosecution of a demand in a court of justice; it is a process for the recovery of a right or claim, and is the institution of a suit for the recovery of a claim. By section 6147, above referred to, the legislature made no attempt to prescribe the method of procedure for the institution of a suit to recover from a delinquent county. By other sections of the statute provision is made for the filing of claims against the county and the audit and allowance thereof by the county board. By section 4441, Ann. St. 1907, county boards are given power to examine and settle all accounts against the county. By section 4455 provision is made for an appeal from the disallowance of a claim. In *State v. Merrell*, 43 Neb. 575, it is said: "All claims against a county

Cass County v. Sarpy County.

must be filed with the county clerk thereof and presented to the county board, and it alone has power and authority to audit and allow such claims." In *Heald v. Polk County*, 46 Neb. 28, it was held that county boards were invested with exclusive original jurisdiction to hear and determine, to allow or disallow, all claims against their counties. To the same effect is *State v. Vincent*, 46 Neb. 408. In the latter case it was held that the jurisdiction of the district court is appellate only, and that an original action on such demands could not be maintained. In *State v. Stout*, 7 Neb. 89, under an act "to provide for the adjustment of claims against the state treasury," etc., the right to bring an original action against the state was denied, and it was held the only mode by which the courts could acquire jurisdiction in such cases was by an appeal, as provided in section 2 of said act. We apprehend that the legislature in the enactment of section 6147 had in view as one of the methods of instituting suit the general provisions of the statute conferring upon county boards the power to audit and pass upon claims against the county. It might be that the delinquent county, upon the presentation of a claim, would be willing to adjust and settle it. We think that the legislature did not contemplate taking away this power from county boards in this class of cases, but that it intended by the language "recovery by suit from the county so in default" to permit the suit to be instituted by an appeal from the disallowance of claims by the county board. Whether under the language used an original action might be maintained, it is unnecessary to determine. It necessarily follows that the district court erred in sustaining the objection to the jurisdiction.

We recommend that the judgment be reversed and the cause remanded for further proceedings according to law.

EPPELSON, C., concurs.

By the Court: For the reasons given in the foregoing opinion, the judgment of the district court is reversed

and the cause remanded for further proceedings according to law.

REVERSED.

ROOT, J., not sitting.

SOUTH OMAHA NATIONAL BANK, APPELLEE, v. HARRY E.
MCGILLIN ET AL., APPELLANTS.

FILED FEBRUARY 6, 1909. No. 15,683.

1. **Chattel Mortgages: SUCCESSIVE MORTGAGES: RIGHTS OF ASSIGNEES.**

Where successive chattel mortgages on a specified number of cattle out of a greater number are given to the same mortgagee, such mortgagee acquires a right of selection, and where the mortgagee assigns the prior mortgage, it only retains the right of selection subject to the right of the first assignee. If it afterwards assigns the second mortgage, the second assignee takes the same subject to the right of the first assignee. *South Omaha Nat. Bank v. McGillin*, 77 Neb. 6, followed.

2. ———: ———: ———. It is immaterial that the second mortgages were renewals of prior mortgages satisfied of record, or that there was an oral agreement between the mortgagor and the mortgagee that the releases placed upon record should not take effect according to their terms.

APPEAL from the district court for Chase county.
ROBERT C. ORR, JUDGE. *Affirmed.*

McCoy & Olmstead, Charles W. Meeker, George L. Loomis and H. C. Maynard, for appellants.

H. C. Brome, P. W. Scott and Clinton Brome, contra.

CALKINS, C.

This case was before this court upon error from a judgment in favor of the defendant, and was reversed for the reasons given in an opinion by BARNES, J. *South Omaha Nat. Bank v. McGillin*, 77 Neb. 6. The second trial resulted in a verdict for plaintiff, and the defendant now

appeals. A reference to the former opinion will disclose the facts presented at that hearing, and the rules of law there applied to the case. The defendant assigns errors in the admission of testimony, and the instructions of the court to the jury, while the plaintiff insists that the rules of law announced in the opinion referred to, applied to the facts developed upon the second trial, required the court to direct a verdict for the plaintiff.

It appears that both plaintiff and defendant claim under mortgages executed by the defendant McClelland to the Shelley-Rogers Commission Company; the mortgage under which the plaintiff claimed being prior in date of execution to those under which the defendant claimed. The defendant contended that the plaintiff's mortgage was given on a specified number of cattle out of a larger number of the same kind and description, and that, the defendant having first secured possession of the property, its lien was superior to that of the plaintiff. The court held that, while such a mortgage is void as to third parties, it gives to the mortgagee the right of selection; that, all the mortgages being given to the Shelley-Rogers Commission Company, it obtained a right of selection under the first mortgage, and if it, after assigning such mortgage to the plaintiff, took another mortgage which gave it a further right of selection from the same description of cattle, this right would be subject to the right of selection which it had assigned in the first mortgage and it could transfer to the defendant no greater right than it itself possessed.

At the second trial the defendant introduced evidence tending to prove that the notes and mortgages were renewals of pre-existing debts contracted before the plaintiff's mortgages were executed, and contended that therefore the lien thereof was prior to that of the plaintiff. The prior mortgages of which the defendant claimed that its mortgages were a renewal had been surrendered and released of record, but the defendant was permitted to prove an oral understanding between the mortgagor and

the Shelley-Rogers Commission Company that the mortgages so released should be considered still in force. The actual date of the transfer by the Shelley-Rogers Commission Company of the mortgages in question to the plaintiff and defendant, respectively, does not appear, but it is stipulated in the record that the same were in each case assigned before maturity. The plaintiff argues that it is to be presumed as a matter of law that the transfer was made at the day of the date of the respective notes, while the defendant denies the validity of that presumption, and contends that, if it would otherwise exist, it is superseded by the stipulation that the notes were transferred before maturity, and that, since this stipulation cannot be construed to mean any specific number of days before maturity, it must be interpreted as meaning just before maturity. It appears from the evidence of Mr. McClelland that the releases were filed after the taking of the new notes and mortgages, and, when these were returned to the Shelley-Rogers Commission Company in the course of a week or two, the old paper would come back and they would be released.

Admitting, for the purposes of the case, the correctness of defendant's contention, it would follow that we must assume that the first note and mortgage assigned to plaintiff, which were dated April 19, 1902, and due November 7, 1902, were transferred to the plaintiff on November 6, 1902, and that the second note and mortgage assigned to plaintiff, dated September 5, 1902, and due April 9, 1903, would have been transferred to plaintiff April 8, 1903. The two notes and mortgages assigned to defendant were dated October 13 and October 30, 1902, and were due April 23 and May 8, 1903, respectively. It would follow from this assumption that, at the time of the transfer by the Shelley-Rogers Commission Company to the plaintiff of the notes and mortgages under which the plaintiff claims, the paper of which it is asserted the notes assigned to defendant were renewals had been satisfied, and that the defendant, when it received from the

South Omaha Nat. Bank v. McGillin.

Shelley-Rogers Commission Company the notes under which it claimed, took the same long after and with constructive notice of the fact that the securities under which it now seeks to claim were satisfied of record. The mortgages assigned by the Shelley-Rogers Commission Company contained the recital that they were a first lien upon the property therein described, and it is clear that under these circumstances, if the Shelley-Rogers Commission Company had retained this paper, it could not have been permitted to establish the priority of its lien over the paper by it assigned to the plaintiff by showing that the former was in fact a renewal of mortgages which were satisfied upon the record, nor by showing any oral understanding between itself and the mortgagor that the releases placed upon record should not take effect according to their terms. Applying the rule announced in the former opinion that the Shelley-Rogers Commission Company could not transfer to the defendant any greater right than it could have enforced as against the plaintiff, it follows that it is entirely immaterial that the defendant's notes and mortgages were in fact renewals, or that there existed between the Shelley-Rogers Commission Company and the mortgagor an oral agreement that the releases of mortgage filed in the clerk's office should not in fact discharge them.

As the court should have directed a verdict for the plaintiff, it is unnecessary to consider the errors assigned in the instructions and in respect to the testimony submitted to the jury.

We therefore recommend that the judgment of the district court be affirmed.

DUFFIE, EPPERSON and GOOD, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

IN RE ANATH P. BARNES.

ANATH P. BARNES, APPELLEE, v. STATE OF NEBRASKA,
APPELLANT.

FILED FEBRUARY 6, 1909. No. 15,736.

Physicians and Surgeons: LICENSES: CONSTITUTIONAL LAW. Chapter 97, laws 1905, providing for the examination and licensing of persons engaged in the practice of veterinary medicine, and forbidding persons not so licensed from assuming the title of veterinary surgeon or the title of any degree conferred by veterinary colleges, does not contravene any constitutional provision.

APPEAL from the district court for Cass county:
HARVEY D. TRAVIS, JUDGE. *Reversed.*

J. J. Thomas, M. D. Carey, and C. A. Rawls, for appellant.

A. L. Tidd, contra.

CALKINS, C.

Anath P. Barnes was charged with a violation of the provisions of chapter 97, laws 1905, entitled "An act to establish a state board of veterinary medicine; to regulate the practice of veterinary medicine, veterinary surgery, veterinary dentistry, or any branch thereof, and to provide for the appointment of examiners and secretaries thereof; to protect the title of those engaged in the practice thereof, and to provide penalties for the violation thereof." Being imprisoned under said charge, he sued out of the district court for Cass county a writ of habeas corpus, alleging the unconstitutionality of said act. The district court sustained his contention, and from a judgment ordering his discharge the state appeals.

The act in question provides for the examination of persons desiring to practice veterinary medicine, surgery or dentistry, and the issuance of a certificate or license to such as shall pass a satisfactory examination in the sub-

jects a knowledge of which is generally required by reputable veterinary colleges. It forbids any person not so licensed to use the title of veterinary surgeon, or the title of any degree conferred by any recognized veterinary college, but specifically provides that nothing therein contained shall prevent any person not assuming such titles from practicing such profession. It is conceded that the legislature had the power under the constitution to provide for such examinations and to prohibit the practice of such profession by all persons not so licensed; but it is insisted that it may not prohibit the use of such titles and leave the unlicensed practitioners free to follow their calling; that the real injury is only done in practice, and not by the assumption of titles, and that, while the right to regulate the practice of veterinary medicine in the interest of the public generally is within the police power of the state, it only takes the public into consideration when it altogether excludes the incompetent person from the practice.

We think that, assuming the legislative power to prohibit veterinary practice by unlicensed persons, there can be no doubt of the inclusion therein of the lesser power of forbidding practitioners from making false representations concerning the character of the preparation made by them for the practice of their profession. We are aware that examinations are imperfect tests of learning, and that degrees afford no guaranty of mature judgment or the possession of practical common sense. We recognize the fact that it is in the school of experience that professional men begin the acquisition of real knowledge; yet the owner of domestic animals requiring the advice or aid of some one skilled in veterinary medicine may well take into account the fact that one practitioner has availed himself of the training afforded by a veterinary college and passed the examination prescribed by the state board, while another has failed to do so; and we think he may properly conclude that, other things being equal, it would be safer to commit the care of his live stock to the one who had

received the training which common experience demonstrates to be desirable, if not indispensable. For one who has had no training of the kind to assume a title which indicates that he is the graduate of a veterinary college, is a species of deceit, which, if practiced with a view of thereby obtaining business, amounts to an attempt to obtain money by false pretenses, which is not only reprehensible, but unlawful. The constitutional right to life, liberty and the pursuit of happiness is not infringed by statutes prohibiting deceit or fraud. The statute in question goes no further than to forbid practitioners of veterinary medicine from deceiving their clientele as to the nature of their preparation for that profession. It leaves the irregular practitioner free to follow his business, upon the sole condition that he uses no deception as to the character of his qualifications, and it does not interfere with the right of any person to employ such practitioner if he chooses to do so. It seems to us less objectionable than a statute unconditionally prohibiting the practice of veterinary medicine by any but persons regularly qualified, and it does not, in our opinion, infringe any right guaranteed by the constitution.

We therefore recommend that the judgment of the district court be reversed.

DUFFIE, EPPERSON and GOOD, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

REVERSED.

ROOT, J., not sitting.

JAMES E. PULVER V. STATE OF NEBRASKA.

FILED FEBRUARY 6, 1909. No. 15,875.

1. **Cities: ORDINANCES: POWER TO SUSPEND.** The mayor of a city has no power to suspend the operation of a city ordinance which contains no provision in itself empowering him so to do.
2. **Intoxicating Liquors: ORDINANCES: VIOLATION: INTENT.** Where a licensed saloon-keeper is prosecuted for the violation of a city ordinance forbidding him to keep his place of business open after 11 o'clock P. M., and such act is shown to have been committed by an agent in charge of such business, it is unnecessary to show any guilty intent on the part of the owner, such prosecution being in the nature of a civil action to recover a penalty.

ERROR to the district court for Kearney county: **HARRY S. DUNGAN, JUDGE.** *Affirmed.*

J. L. McPheeley, for plaintiff in error.

M. D. King, *contra.*

CALKINS, C.

An ordinance of the city of Minden regulating the issuance of licenses for the sale of intoxicating drinks made it unlawful for any person licensed to keep his place of business open or sell any liquors after the hour of 11 o'clock P. M., whether by himself or his clerk. The plaintiff in error was convicted in the police court upon a charge of violating this provision of the ordinance, and, having appealed from said conviction to the district court, he was again tried and found guilty. From a judgment imposing a fine of \$25 and costs he brings error to this court.

1. It is admitted that the plaintiff in error was a licensed saloon-keeper, and that his saloon, which was at the time in the care of his son, was on the date mentioned in the charge kept open until 11:15 P. M.; but it is urged as a defense to the charge that the mayor of the city gave

permission to the saloon-keepers thereof to keep their places of business open on this particular night until midnight. This fact does not constitute a defense. The mayor has no power to suspend the operation of an ordinance of the city which contains no provision in itself empowering him to do so. *Commonwealth v. Worcester*, 20 Mass. 462.

2. It is further urged that the guilty intent necessary in criminal prosecutions is wanting in this case for two reasons: First, because the party in charge of the saloon acted in good faith upon the authority of the mayor, which he supposed was sufficient; and, second, because the plaintiff in error himself was away from home and did not have any knowledge of nor in any way participate in the act with which he is charged. There is no merit in the first contention. Ignorance of law does not excuse. The intent required in a criminal case is not to break the law, but to do the forbidden act. 1 Bishop, Criminal Law (8th ed.), sec. 300. The second reason is equally untenable, because here the charge is a violation of a city ordinance, not embracing any offense made criminal by the laws of the state. This proceeding, while in form a criminal prosecution, is in fact a civil action to recover a penalty. *Peterson v. State*, 79 Neb. 132. The law of master and servant applies, and the former is responsible for the acts of the latter in the conduct of his business, whether committed with or without his knowledge.

We therefore recommend that the judgment of the district court be affirmed.

DUFFIE, EPPERSON and GOOD, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

SAMUEL E. HOWELL V. STATE OF NEBRASKA.

FILED FEBRUARY 20, 1909. No. 15,120.

1. **Monopolies: CRIMINAL INDICTMENT: SUFFICIENCY.** To charge a criminal violation of the first section of art. II, ch. 91a, Comp. St. 1907, "To protect trade and commerce against unlawful restraints and monopolies," commonly called the "Junkin Act," the indictment or information must allege that the acts complained of were in restraint of trade within this state.
2. ———: **CRIMINAL PROSECUTION: INSTRUCTIONS.** A number of persons, dealers in coal and other fuels, in the city of Omaha, created and became members of a local organization known as the "Omaha Coal Exchange," and were subsequently indicted under what is called the "Anti-Trust Laws" of this state. Upon the trial of one of the indicted parties the constitution of the exchange was introduced in evidence by the state, and which contained an article prohibiting the members from soliciting trade by the personal appeals of themselves or their agents, but allowing the use of printed postal cards and nonaddressed printed matter inclosed in envelopes, and providing that the exchange should not interfere with prices made between members, or as to whether the same should be at wholesale or retail prices. The court instructed the jury that that article of the constitution was "in itself" a violation of the law of this state, and, if they found that it was in force and carried out by the defendants, the accused was guilty of the crime charged. The instruction is *held* erroneous; that it was proper for the jury to take the article into consideration in arriving at their verdict, but that it did not, of itself, foreclose further inquiry as to defendant's guilt.
3. ———: **MEMBERSHIP.** It was shown by the evidence that the accused on trial had not, personally, become a member of the Omaha Coal Exchange, but that he was a member and president of another organization which was, itself, a member of the exchange; that he was the president of the Omaha Coal Exchange and chairman of its board of directors, which had the management of its business, and that he acted in both capacities. *Held*, That this constituted him, to all intents and purposes, a member of the exchange and liable criminally to the same extent as though he had personally signed the constitution and been admitted to membership.

ERROR to the district court for Douglas county: ABRAHAM L. SUTTON, JUDGE. *Reversed*.

Hall & Stout and W. J. Connell, for plaintiff in error.

William T. Thompson, Attorney General, and Grant G. Martin, contra.

REESE, C. J.

Plaintiff in error, with more than 50 other persons, was indicted by the grand jury of Douglas county for a violation of that part of art. II, ch. 91a, Comp. St. 1907, relating to "Restraints, Monopolies, Rebates," commonly known as the "Anti-Trust Law," or the "Junkin Act." The indictment consists of 9 counts covering 23 pages of closely typewritten matter and is too long to be here set out. The prosecution grows out of the creation and existence of an organization, or, as alleged, a combination of dealers in coal and wood in that county, who organized, set on foot, and continued the organization known as the "Omaha Coal Exchange," the object and purpose of which, it is alleged, was to fix and establish the price of fuels to be sold at retail in the city of Omaha and the nearby country, and to restrain the trade therein. Plaintiff in error was put upon his trial, which resulted in a general verdict finding him "guilty of restraint of trade as he stands charged in the information." A motion for a new trial was filed, which being overruled, a judgment of conviction was entered. The case is brought to this court by proceedings in error. The record is voluminous, consisting of nearly 3,000 pages. There are 159 assignments of alleged errors in the petition. The proper consideration of the time at our disposal forbids a detailed review of the evidence, the instructions, or even to notice all the assignments.

The first count charges the persons indicted with having "unlawfully and feloniously joined themselves together and formed a trust and combination, the purpose and effect of which trust and combination is to restrain trade, to increase prices of coal and other fuels, to prevent com-

petition in the sale of coal and other fuels, to fix the price of coal and other fuels, and to agree not to sell any coal and other fuels below a certain fixed figure, and that said (defendants, naming them) are unlawfully members of said trust and combination, and are unlawfully aiding, advising, abetting, counseling and acting in pursuance to an agreement entered into by the members of said trust and combination, which trust and combination has unlawfully prevented, and does unlawfully prevent, competition in the sale of coal and other fuels, and have unlawfully agreed not to sell coal and other fuels below a certain figure, and have unlawfully prevented the sale of coal and other fuels below a certain fixed figure determined by said trust and combination, with the intent then and there and thereby unlawfully, feloniously and arbitrarily to prevent competition and fix an established price at which said coal and other fuels are sold." This count is attacked upon the ground that it is nowhere charged that the alleged trust, combination, or monopoly was with the intent and for the purpose of fixing and controlling prices of coal and other fuels in this state. The language of the statute under which the indictment was drawn provides: "Every contract, combination in the form of a trust or otherwise, or conspiracy in restraint of trade or commerce, within this state, is hereby declared to be illegal," etc. It is evident that the object of the legislation was and is to make criminal the formation of such conspiracies within this state for the purpose of restraining or controlling trade and commerce within its borders, as there is no authority making such acts criminal when interstate commerce is to be thereby affected. It follows that that count of the indictment must be held incomplete and does not charge the commission of an offense.

The second and subsequent counts, in other respects quite similar to the first, are not obnoxious to the same criticism, for they contain the averment omitted from that count. They are assailed upon other grounds, but as the members of the court are not in entire harmony in their

views upon these questions, and as all agree that the judgment should be reversed for another and independent reason, these counts will not be further noticed.

As may be inferred from what we have already said, the evidence submitted to the jury was very voluminous, consisting of the oral testimony of witnesses and of documentary evidence. Among the latter was the constitution and by-laws of the Omaha Coal Exchange, of which it was alleged and substantially proved that the accused were members. Plaintiff in error, personally, was not a member of the exchange, but was a member and president of the West Omaha Coal and Ice Company, which was a member of said Omaha Coal Exchange. He was elected to the office of president of said Omaha Coal Exchange, held the office and discharged the duties thereof, and was also chairman of the board of directors, to whom was given the general management of the exchange. This, in the opinion of the writer, made him to all intents and purposes, a member of the Omaha Coal Exchange and liable to a criminal prosecution with other members of that organization, if such organization was criminal and in violation of law. He was in the chair, presiding over the meeting of the exchange, at the time of the adoption of the amended constitution and by-laws on April 24, 1903. Among other articles of the constitution then adopted was article 12, which reads as follows: "Soliciting referred to in the by-laws hereafter written shall apply to members of any firm having a membership in this exchange, their agents, clerks and drivers, and shall consist of the personal or verbal introduction of the subject, the personal presentation of a card or other token of business or any other act calculated to effect a sale; but it is understood that printed postals with the address only on one side and nonaddressed printed matter inclosed in addressed envelopes are not within the inhibition of this section. The exchange shall not interfere with prices made between members of the exchange, or as to whether the same shall be at wholesale or retail prices."

The twenty-eighth instruction given to the jury by the court is as follows: "You are instructed that article 12 of the constitution of the Omaha Coal Exchange is in itself a violation of the law of this state; and if you find from the evidence, beyond a reasonable doubt, that article 12 of said constitution of said exchange was in force at any time between July 1, 1905, and the 14th day of September, 1906, and that during that period, or at any time during that period, the defendant and one or more of the defendants in this case were members of said exchange, and that they unlawfully, wilfully, purposely and intentionally conspired or agreed together to carry out the terms of said section of the constitution, in the city of Omaha, county of Douglas, state of Nebraska, then you are instructed that the defendant has been carrying on his business in restraint of trade and in violation of the laws of the state of Nebraska, and you should convict him of the crime set forth in the indictment." After the jury had retired and had been deliberating for some time, they returned and asked for "additional information on instruction No. 28 given by the court on its own motion," when the court gave the following as an additional instruction upon article 12: "In compliance with the request of the jury, the court explains instruction No. 28 as follows: The court instructed the jury in instruction No. 28 that article 12 of the constitution of the Omaha Coal Exchange, if kept in force by agreement of the defendant and one or more other members of the Omaha Coal Exchange at the same time, at any time between July 1, 1905, and September 14, 1906, or if the defendant and one or more members of the Omaha Coal Exchange at the same time carried on their coal business in obedience or compliance with section 12 of said constitution of the Omaha Coal Exchange in Omaha, Douglas county, Nebraska, the defendant would be guilty of doing business in restraint of trade. For the information of the jury the court gives the jury a correct copy of said article 12 of the constitution of the Omaha Coal Exchange. 'Article 12. Soliciting referred to in the

by-laws hereafter written shall apply to members of any firm having a membership in this exchange, their agents, clerks and drivers, and shall consist of the personal or verbal introduction of the subject, the personal presentation of a card or other token of business or any other act calculated to effect a sale; but it is understood that printed postals with the address only on one side and nonaddressed printed matter inclosed in addressed envelopes are not within the inhibition of this section. The exchange shall not interfere with prices made between members of the exchange, or as to whether the same shall be at wholesale or retail prices.' This instruction is to be read in connection with instruction 28 of the original instructions."

We are unable to find anything in the by-laws bearing upon the matter of soliciting. So far as the general criminal character of the Omaha Coal Exchange and its proceedings are concerned, there may be a difference of opinion, but upon this subject the writer entertains no doubt. Some of its acts may not be open to criticism; others are. However, we cannot see that the instruction above quoted should have been given. We are unable to comprehend how that twelfth article, singled out and taken by itself, is "in itself a violation of the law of the state," nor can we see that the additional instruction aided the twenty-eighth. It is not for us, nor was it for the jury, to infer any hidden, ulterior or criminal purpose secreted or concealed in, but unexpressed by, the language of the article when considered "in itself." It is somewhat doubtful if any real purpose or meaning can be found in the language used. It is probable that its purpose was to prohibit members of the exchange from personally, or by its agents or employees, soliciting trade, but permitting it to be done by circulars or other printed matter of the character mentioned. It may be, if such was the purpose of the article, that indulging in personal solicitation of trade might induce active competition, and thereby offer a temptation to underbid and thus depress prices to a figure

below a scale "fixed," but that idea does not appear as matter of law in the language used "in itself." The jury were not informed that the article might be considered by them in arriving at their conclusion as to its purpose or the purposes of the "exchange," but that it was "in itself" a violation of law, thus foreclosing further inquiry.

In the construction of this statute and the article of the constitution copied, we are cited to the decision of the supreme court of the United States in the case of *Hopkins v. United States*, 171 U. S. 578, and by some it is thought to be decisive of this question. In that case the members of the Kansas City Live Stock Exchange, a voluntary incorporated association, had agreed upon certain rules governing the transaction of their business, the tenth of which prohibited the employment of any agent, solicitor, or employee, except upon a stipulated salary, not contingent upon the commission earned, and that not more than three solicitors should be employed at one time by a commission firm or corporation, resident or nonresident of Kansas City. The eleventh rule prohibited the members from sending or causing to be sent a prepaid telegram or telephone message quoting markets or giving information as to the condition of the same under the penalty of a fine. The ground upon which that case was decided was that the business of the Kansas City Live Stock Exchange was not interstate business, and therefore was not subject to control by act of congress under which the suit had been instituted. What the decision would have been had that question been decided otherwise is subject to conjecture. It is true that the court holds that the rules referred to are not violative of the law of congress, but this is based solely upon the fact that the business to which they refer is not interstate commerce. In *Addyston Pipe and Steel Co. v. United States*, 175 U. S. 211, 243, the same judge who wrote the opinion in the *Hopkins* case says: "The cases of *Hopkins v. United States*, 171 U. S. 578, and *Anderson v. United States*, 171 U. S. 604, are not relevant. In the *Hopkins* case it was held that the business of the

members of the Kansas City Live Stock Exchange was not interstate commerce, and hence the act of congress did not affect them." The same is stated, in substance, in *Montague & Co. v. Lowry*, 193 U. S. 38; *Swift & Co. v. United States*, 196 U. S. 375; *Loewe v. Lawlor*, 208 U. S. 274. We thus refer to the *Hopkins* case at some length because it is insisted by some to be decisive of this case, which it clearly is not.

For the error in giving the twenty-eighth instruction, the judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED.

ROSE, J., not sitting.

JOHN A. LUTHER V. STATE OF NEBRASKA.

FILED FEBRUARY 20, 1909. No. 15,188.

1. **Intoxicating Liquors: ILLEGAL SALES.** The prohibition by sections 11 and 20, ch. 50, Comp. St. 1907, of the sale or keeping for the purpose of sale of malt liquors without a license so to do applies to all malt liquors sold or kept for sale to be used as a beverage, whether intoxicating or not.
2. ———: ———: **EVIDENCE.** In a criminal prosecution for the violation of such sections, or either of them, where the charge is of selling or keeping for the purpose of sale any "malt," "spirituous," or "vinous" liquors, and the proof shows that any of said prohibited liquors was sold or kept for sale, the state is not required to allege or prove that the liquors sold or kept for the purpose of sale are in fact intoxicating. It is sufficient to allege and prove the sale or the keeping for the purpose of sale of any of the prohibited liquors in violation of the terms of said sections.
3. **Criminal Law: INSTRUCTIONS: HARMLESS ERROR.** The information alleged in appropriate counts that the accused kept for sale and sold "a certain malt and intoxicating liquor, to wit, malt tonic." The evidence showed that upon analysis the liquor was a malt liquor, containing one and one-tenth per cent. of alcohol, and that it belonged to the "class of beers." The trial court submitted to

Luther v. State.

the jury the question of the intoxicating properties of the liquor by permitting the accused to call witnesses accustomed in some degree to the use of intoxicants, who testified that they had partaken of the beverage, and that it had no intoxicating effect upon them and was not intoxicating. The state called a witness, who testified that he had purchased and used the drink, and that it had the same effect upon him as produced by drinking beer, but to a less degree. The court instructed the jury, in substance, that in order to convict the accused they must find him guilty of selling or keeping for the purpose of sale the "liquors as charged and described in the information." *Held*, First, that this submitted to the jury the question of the intoxicating properties of the liquor; second, that the action of the court in submitting the question of the intoxicating properties of the liquor was erroneous, but without prejudice, as it was upon the procurement of the accused.

REHEARING of case reported in 80 Neb. 432. *Judgment of district court affirmed.*

REESE, C. J.

This case was decided at the September term, 1907, of this court, and the opinion is reported in 80 Neb. 432. The attorney general filed a motion for rehearing, which was sustained, and the case has been submitted to the court upon carefully prepared briefs and able oral arguments by counsel. The contention of the attorney general is: First, that the proof upon the trial was conclusive that the liquor sold and kept for sale was "malt liquors," and therefore the selling and keeping for sale of the liquors described was a violation of law, and the conviction should be sustained without any inquiry as to the intoxicating or nonintoxicating properties of the liquor; second, that, should the court hold otherwise, the question of the intoxicating quality of the liquor kept for sale and sold was sufficiently submitted to the jury, and that in that event the judgment should be affirmed. It is contended by plaintiff in error: "First, it is not a violation of our liquor law to sell a malt extract, unless the same is shown to be of such an intoxicating character that it may be used as a beverage, and that when used in practicable

quantities it will produce intoxication; second, that the court will not take judicial notice that malt extract is an intoxicating liquor, but that this question is one of fact to be submitted to the jury; third, that the instructions requested by the defendant should have been given, and that the court erred in omitting from the instructions given the element of the intoxicating character of malt extract as one of the material issues to be tried."

It is charged in the first count of the information that plaintiff in error unlawfully kept for the purpose of sale "certain malt and intoxicating liquor, to wit, malt tonic," with intent to sell the same; and in the second count that he unlawfully sold to a person named "certain malt and intoxicating liquor, to wit, malt tonic"; and in the third count that he sold of said liquor to another person; and in the fourth count that he sold the same to a person named; and in the fifth count that he sold the same to yet another person named. The jury returned a verdict finding plaintiff in error guilty on all the counts of the information. The court imposed a fine of \$100 upon each count.

It was shown upon the trial that upon the filing of the complaint before the magistrate a search warrant was issued, and the sheriff in making a search of the premises of plaintiff in error found "four full barrels and about a half barrel" of the liquor. There was ample proof that the liquor was kept for sale and sold to be drunk as a beverage, and that a considerable quantity of it had been sold and consumed. The liquor was in bottles, each bottle bearing an illuminated label as follows, omitting names and locality of the brewing company: "——— Brewing Company's NON INTOX. A nonintoxicating malt tonic. Guaranteed to contain less than 2% of alcohol. Brewed and bottled by the ——— Brewing Co., ———, Illinois. Western Branch, ———, Mo." The state chemist was called as a witness on the part of the state, and testified that samples of the liquor had been sent to and analyzed by him, and that the liquor was malt liquor; that all liquors that were brewed from malt were necessarily malt

liquors; and that the liquor contained in the bottles is classed "in the class of beers"; that the quantity of alcohol contained in the liquor was one and one-tenth per cent.; that the quantity of alcohol usually contained in the lager beer of commerce is on average "around 3 per cent." There is no controversy as to the possession and sale of the liquors by plaintiff in error, nor that they were sold and to be sold to be drunk as a beverage. The only contentions are as outlined above. There was no effort to contradict the testimony of the state chemist to the effect that the liquor was a malt liquor, that it contained the percentage of alcohol named, and that it is classed as and among "the class of beers."

It is contended by the state that under our statutes it was not essential that the prosecution should go farther with its proof; that if the liquor was a "malt liquor" and belonged to the class known as beer, the statute having prohibited the sale of "malt liquor," and this court having so often decided that the courts will take judicial notice that beer is an intoxicant, the verdict was right and should be sustained. Chapter 50, Comp. St. 1907, commonly known as the "Slocumb Law," provides in the first section that licenses may be issued for the sale of "malt, spirituous and vinous liquors." In section 6 the issuance of a license to sell "malt, spirituous and vinous liquors" is prohibited, unless the applicant gives the bond required by the section. Section 10 prohibits any licensed person from selling intoxicating liquors to the classes of persons named therein. Section 11 provides that "all persons who shall sell, or give away, upon any pretext, malt, spirituous, or vinous liquors, or any intoxicating drinks," without having first complied with the provisions of the act, and obtained a license, shall be deemed guilty of a misdemeanor and punished as prescribed in the section. Section 13 makes it a crime for any licensed person to sell or give away, either by himself or another in his employ, any "malt, spirituous, or vinous liquors," which shall be adulterated. Section 14 makes it a crime to sell or give away

"any malt, spirituous and vinous liquors on the day of any general or special election, or at any time during the first day of the week, commonly called Sunday." Section 20 renders it unlawful for any person to keep for the purpose of sale without license "any malt, spirituous, or vinous liquors," and "any person or persons who shall be found in possession of any intoxicating liquors in this state, with the intention of disposing of the same without license," shall be deemed guilty of a misdemeanor. Section 25 confers upon the corporate authorities of cities and villages the power to license, regulate and prohibit "the selling or giving away of any intoxicating, malt, spirituous and vinous, mixed or fermented liquors within the limits of such city or village." Section 29 renders it "the duty of all vendors of malt, spirituous, or vinous liquors" to keep the windows and doors of their places of business unobstructed.

We have thus quoted from the different sections of the law for the purpose of seeking light upon the legislative intent in the passage of the act under consideration. It is contended by counsel for plaintiff in error that it was the legislative intent to suppress the sale of intoxicating liquors, and that, although the term "malt liquors" is used in the act, yet it was not the purpose to prevent the sale of malt liquors or liquids, unless they contained a sufficient quantity of alcohol to produce intoxication; or, stated differently, that the language used in sections 11 and 20 must be construed to mean as if it read "intoxicating malt liquor." I cannot read the statute in that light. As well might we apply the adjective to the words "spirituous" and "vinous." It is my opinion that the legislature realized and appreciated the fact that malt, spirituous and vinous liquors are equally largely used as a beverage, and are alike injurious to the consumer, if not by producing immediate intoxication when taken in small quantities, by producing the same effect when more is taken, and at the same time creating an abnormal appetite which leads to dissipation and inebriety. At any rate, the law pro-

hibits the sale of "malt liquors" without a license, and we must obey its plain mandate. Alcoholic beverages are under the ban of the law in some form or other in most civilized countries. They are known to be the cause of crime, destitution and pauperism. Malt liquors used as beverages are known to contain that destructive ingredient. It was proved upon the trial of this case that the beverage kept and sold by plaintiff in error contained it. The liquor sold by him was simply an effort to evade the law. The title of the act is "An act to regulate the license and sale of malt, spirituous, and vinous liquors," etc. The whole act is built upon that title. Malt liquors are as much within both the letter and spirit of the law as either of the other classes named. To say that the legislature intended to provide for the regulation and license of *intoxicating* malt liquors would require the same word to be used as defining the other classes, and would be legislating and reading into the statute a word which the legislature clearly intended should not be there. This is not the province of the courts. We are sustained in this view by many adjudicated cases, some of which we cite, without quoting: *Kerkow v. Bauer*, 15 Neb. 150; *Sothman v. State*, 66 Neb. 302; *Peterson v. State*, 63 Neb. 251; *State v. Teis-sedre*, 30 Kan. 476; *Stout v. State*, 96 Ind. 407; *Briffitt v. State*, 58 Wis. 39; *Commonwealth v. Timothy*, 8 Gray (Mass.) 480; *Commonwealth v. Anthes*, 12 Gray (Mass.) 29; *Eaves v. State*, 113 Ga. 749; *State v. Gill*, 89 Minn. 502; *Commonwealth v. Dean*, 14 Gray (Mass.) 99; *State v. Jenkins*, 64 N. H. 375; *Hatfield v. Commonwealth*, 120 Pa. St. 395; *Commonwealth v. Reyburg*, 122 Pa. St. 299; *Kettering v. City of Jacksonville*, 50 Ill. 39; *State v. Yager*, 72 Ia. 421; *State v. O'Connell*, 99 Me. 61; *State v. Intoxicating Liquors*, 76 Ia. 243. "But if the statute specifically forbids the unlicensed sale of 'malt liquor,' the question of the intoxicating properties of the liquor sold is immaterial; it is only necessary to determine whether it was a malt liquor." 23 Cyc. 60. "Any liquor which is named or plainly included in the statute must be held intoxicating

as a matter of law, without inquiry into its actual properties, and even though, as a matter of fact, it is not capable of producing intoxication." 23 Cyc. 57.

It is claimed that the words "malt, spirituous, or vinous liquors" and "intoxicating drinks," as used in section 11, and "intoxicating liquors," as used in section 20, are used interchangeably, and all mean the same. To this we cannot agree. As we have seen, the statute prohibits the sale of either "malt," "spirituous," or "vinous" liquors in specific terms by name. As said in many of the cases above cited, this is a specific and direct prohibition, but the legislature, recognizing the fact that there are other intoxicants which do not come strictly within the classes named, the words "or any intoxicating drinks," as in section 11, and "any intoxicating liquors," as in section 20, were used to cover all kinds not within the classes named; that, if the charge and proof are that any one of the classes were sold or kept for sale, no proof of the intoxicating property of the liquor was necessary, and that it is only necessary to prove that the liquor sold or kept for sale is one of the classes forbidden. But, should the accusation refer to any other kind of liquor, it should be alleged and proved that the article was intoxicating. This, I think, is the correct interpretation of the statute and without further inquiry the judgment of the district court should be affirmed.

However, there is another feature of this case upon which we all agree, and that is, whether correctly or incorrectly, the district court did submit the question of the intoxicating quality of the liquor to the jury, and that by their verdict the jury answered the question. The averments of the information are that, at the time and place named in the several counts, plaintiff in error kept for sale and sold "certain malt and intoxicating liquor, to wit, 'malt tonic,' " etc. The same language, descriptive of the article sold or kept for sale, is used in each of the five counts in the information. The widest latitude was allowed plaintiff in error in his efforts to prove that the

drinks sold and kept for sale were not intoxicating. A number of witnesses who had partaken of the beverage were called, and testified to the fact of drinking the same, and that no intoxicating effect was felt by them, and that the drink was not intoxicating. One witness who was called by the state testified that he drank of the liquor, and it had the same effect upon him as beer, but in a less degree. The state chemist testified that the intoxicating ingredient was alcohol, and the effect depended upon the individual drinking the liquor, and the lower grade or per cent. of alcohol would produce intoxication in a person who was not accustomed to drinking, while a higher grade would be necessary to intoxicate the individual who was in the habit of drinking the stronger liquors.

The court instructed the jury that the material allegations which the state must prove were that the plaintiff in error kept or sold liquors "as charged in the information"; that in order to convict it was necessary that the proof show that plaintiff in error had the liquors "described in the information" and sold the same. It is not deemed necessary to further refer to the instructions. It is sufficient to say that the instructions, while not as explicit as they might have been, had any upon that point been necessary, yet, when taken in connection with the evidence, were sufficient to submit the question of the intoxicating properties of the liquor to the jury. We are of the opinion, however, that the question was improperly submitted, and that no evidence should have been received upon that subject. The error, however, having been by the procurement of plaintiff in error, and in no sense to his prejudice, he cannot complain.

The judgment of the district court is

AFFIRMED.

ROSE, J., not sitting.

LETTON, J., dissenting.

I cannot agree to the main holding in the opinion. It seems to hold that the selling of all malt liquids or

liquors, regardless of whether they contain intoxicating properties, is prohibited. I think that a holding that the sale of malt beverages nonintoxicating in character is a crime, unless a license has first been obtained under the provisions of the liquor law, is an entirely new doctrine in this state, and gives to the law such a new and radically changed interpretation from that which has been followed by administrative, executive and judicial officers of the government for nearly 40 years as to partake of the character of judicial legislation. I venture to say that it has been the uniform practice of public prosecutors in liquor cases ever since the law was enacted to prove, or endeavor to prove, the intoxicating quality of malt beverages, other than beer, ale or such liquors that are of such well-known ingredients and qualities that the court will take judicial notice that they are within the prohibition of the statute. When the legislature prohibited the sale of malt, spirituous or vinous liquors, I think the word "liquors" was used in the ordinary acceptation of the term. The Century Dictionary defines liquor: (1) A liquid or fluid substance, as water, milk, blood, sap, etc. (2) A strong or active liquid of any sort. Specifically—(a) An alcoholic or spirituous liquor, either distilled or fermented; an intoxicating beverage; especially, a spirituous or distilled drink, as distinguished from fermented beverages, as wine and beer. (b) A strong solution of a particular substance, used in the industrial arts. Webster: (1) Any liquid substance, as water, milk, blood, sap, juice, or the like. (2) Especially, alcoholic or spirituous fluid, either distilled or fermented. A decoction, solution or tincture.

There are many tonic preparations of malt combined with ingredients, such as iron, phosphates or other drugs, and other and nourishing preparations of malt combined with ingredients of food value for the use of convalescents, which are in constant use by the medical profession, and which are sold in drug stores. This opinion, construed strictly, would drive all this class of preparations from

the market, which I think was never intended by the legislature. The object of the law was to regulate the sale of malt "liquors," not malt *liquids*. An examination of the liquor laws of this state as a whole confirms me in the belief that this is the reasonable and proper construction of the statute. The phraseology used in describing the liquors varies with the various sections of the liquor law. Comp. St. 1907, ch. 50. In the first section the county board is authorized to license the sale of "malt, spirituous and vinous liquors." The word "intoxicating" does not appear in this section. Section 5 speaks of the thing to be licensed as "the liquor." It uses no other qualifying words. The form of the license prescribed by this section names "malt, spirituous and vinous liquors," but does not contain the word "intoxicating." The sixth section says that no person shall be licensed to sell "malt, spirituous and vinous liquors" by the county board, etc., unless a bond is given, and provides that a bond shall be given for the benefit of any one who may be injured by the sale of "any intoxicating liquor." No one could recover damages under bond for sale of liquors unless they were intoxicating liquors. Section 8 prohibits the sale to any minor, apprentice, or servant, under 21 years of age of any "malt, spirituous and vinous liquors, or any intoxicating drinks." Section 10 prohibits the sale of "any intoxicating liquors to any Indian, insane person, or idiot, or habitual drunkard." Section 15 provides that the person licensed shall pay damages that result in consequence of "such traffic," and the expenses of all civil and criminal prosecutions growing out of, or justly attributed to, this traffic in intoxicating drinks, so that the words "such traffic" relate to the traffic forbidden in the chapter, and this section construes it to be traffic in intoxicating drinks. Section 16 gives an action to a married woman for damages on account of "such traffic," which we have seen by section 15 is characterized as being traffic in intoxicating drinks, and section 17 gives an action by the county or city on

the bond of the person licensed, when a person shall become a county or city charge by reason of intemperance, against "any person licensed under this act, who may have been in the habit of selling or giving intoxicating liquors" to such persons, and in the proviso to this section any person against whom a judgment shall be rendered under the provisions of the section may recover from any other person who has "sold or given liquor to such person becoming a public charge." Section 18 provides that, in the trial of suits the cause or foundation of which shall be the acts done or injuries inflicted by a person "under the influence of liquor," it only shall be necessary to sustain the action to prove that the defendant sold or gave liquor to the person so intoxicated. Plainly the word "liquor" here, as in all places in the statute, should be read "intoxicating liquor." In the last part of section 18 the words "intoxicating drinks" are used as an exact equivalent of the word "liquor" where it twice occurs in the same section. Section 20 prohibits the keeping of any "malt, spirituous, or vinous liquors" for the purpose of selling without license, and it provides that any one who is found in possession of "intoxicating" liquors with intention of disposing of the same without license shall be deemed guilty.

Unless we consider that the liquors kept for sale must be intoxicating liquors in order to make the act of keeping them unlawful, we must presume that the legislature would forbid the keeping of inoffensive liquors, and in the same section provide that the person who was found keeping intoxicating liquors should be punished, without providing that the person keeping the other forbidden liquors should be punished; in other words, that the legislature would prohibit the keeping of liquors, but provide no punishment therefor, and then provide punishment for keeping intoxicating liquors which it had not specifically prohibited. In this same section the word "liquor" is used seven or eight times without any quali-

fyng word, and twice used qualified by the word intoxicating, and so, as in other places in the statute, the word "liquor" is used as meaning "intoxicating liquor." In section 21 the word "liquors" is used five times without any qualifying word, and in section 22 at least five times. In section 24 a permit is authorized to druggists to sell "liquors" without any qualifying word, but I think it clear that "intoxicating liquors" is meant. It is also provided further that no license shall be granted by a village for the sale of any "liquor" within $2\frac{1}{2}$ miles of a military post. By section 26 druggists who have permits are required to keep a register of "all liquors sold or given away by him." This is not limited to malt, spirituous and vinous liquors, and the word "intoxicating" is not used. If the word "liquors" is to be construed in this section as it is in the opinion, the report required of a druggist is much greater than anybody ever supposed, and all medicinal preparations of malt would have to be reported. Section 30a, ch. 50, Comp. St., being a part of the act of 1907, speaks of the liquor license authorized under the liquor law as a license for the sale of "intoxicating liquors," and the next section of the same act (30b) says that it shall be unlawful for any person engaged in the manufacture of malt, spirituous, or vinous liquors to aid or assist in procuring a license for any person for the sale at retail of malt, spirituous or vinous liquors, and then speaks of these liquors so defined as "said intoxicating liquors," thereby expressly stating that the malt, spirituous and vinous liquors named in the liquor law are intoxicating liquors, and in section 30g of the same act it speaks of all of the other acts as "acts relating to intoxicating liquors." The act against treating forbids the giving away of any intoxicating drink. The first section of the act of 1907 (Comp. St. ch. 50, sec. 39), regulating the transportation of intoxicating liquors, makes it unlawful to consign intoxicating liquors from one point in the state to another. If the sale of malt liquors not intoxicating is forbidden by the statute, that should have

been included in this provision, and the fourth section of the same act (Comp. St., ch. 50, sec. 42) forbids the bringing of any malt, spirituous, vinous or intoxicating liquors into any city or incorporated village in which a license has not been granted, etc. It is manifest that the word "liquors" is used in this act also with the meaning of "intoxicating liquors," and that a malt preparation that is not intoxicating would not be included in the meaning given to the word "liquors." If this case had been presented nearly 50 years ago, as it might have been, since the main provisions of the statute were enacted in 1858 (see *Rohrer v. Hastings Brewing Co.*, ante, p. 111), a holding that the sale of any malt liquor was prohibited unless the seller was licensed might perhaps have been justified, though this is questionable; but, after half a century of liquor legislation and official construction, it seems to me too late to take this view, and I am firmly of the opinion that the change, if made at all should be made by the legislature.

Cases from other states throw but little light upon the question, since in order to reach the true meaning of each opinion the whole statute must be considered and compared with the statute in this state. But the courts of other states are not in harmony, the holding of the different states depending upon the interpretation and construction of the respective statutes. In Pennsylvania, Illinois and Maine the cases cited by Judge REESE hold specifically that proof of the intoxicating quality of malt liquor is unnecessary. In Minnesota it seems to be held that a charge of selling malt liquor implies that the liquor has intoxicating qualities. It is said in *State v. Gill*, 89 Minn. 502, cited in the majority opinion, that whether or not the liquor was really intoxicating is a question of fact for the jury. See, also, *State v. Story*, 87 Minn. 5. If I understand the Minnesota holdings correctly, they are exactly in line with what is and has heretofore been considered to be the law in this state, and are not in harmony with the majority opinion here; and I think the

cases cited from other states do not all support the opinion. The Massachusetts case cited in the opinion merely holds that, where a statute declares that lager beer shall be deemed intoxicating, it cannot be proved not to be intoxicating in a prosecution for selling intoxicating liquors. The Kansas and Wisconsin cases merely hold, as does this court, that the courts will take judicial notice that beer is a malt liquor and intoxicating.

Further, the defendant was charged with selling "a malt and intoxicating liquor, to wit, malt tonic." To charge a sale of intoxicating malt liquor and prove non-intoxicating would be, I think, a fatal variance between the pleadings and the proof. The defendant requested instructions which are set out in the original opinion, 80 Neb. 432, that the state must prove that the malt tonic was intoxicating. Each side introduced testimony concerning the intoxicating character of the liquor in controversy, so that the state concluded that the intoxicating quality of the liquor was a material allegation necessary to be proved to entitle it to a conviction. The trial court therefore erred in refusing to give instructions 1 and 2 requested by the defendant. Perhaps inferentially the jury might conclude from the ninth instruction given by the court that "malt liquor" referred to intoxicating liquor, but it did not supply the instructions asked by defendant.

Under the charge, it was error to refuse these instructions, and the original judgment should be adhered to.

BARNES, J., concurs in this dissent.

JOHN ROSENBERG, APPELLEE, v. U. S. ROHRER, APPELLANT.

JOHN R. FREITAG, APPELLEE, v. U. S. ROHRER, APPELLANT.

JOHN CURRY, APPELLEE, v. U. S. ROHRER, APPELLANT.

PAUL SCHISSLER, APPELLEE, v. U. S. ROHRER, APPELLANT.

FRANK J. NEYLON, APPELLEE, v. U. S. ROHRER, APPELLANT.

FILED FEBRUARY 20, 1909. Nos. 15,980, 15,981, 15,982, 15,983, 15,984.

1. **Intoxicating Liquors: PETITION FOR LICENSE: BURDEN OF PROOF.** In an application for license to sell intoxicating liquors, to which a remonstrance was filed wherein it was claimed that the petition was not signed by the requisite number of freeholders, the burden of proof was upon the petitioner to establish by competent evidence the fact that a sufficient number of the petitioners were freeholders.
2. ———: ———: **EVIDENCE.** In such case, neither the certificate of the register of deeds of the county that the signers were freeholders, nor the testimony of the deputy assessor who made the last assessment, to the same effect, would be competent evidence. The introduction of deeds of conveyance to the signers of the petition, ranging in dates from 1879 to 1907, while competent to prove that the signers had at one time owned the real estate, were therefore admissible, but did not alone establish the fact of ownership at the time of signing the petition, no other competent proof of present ownership being offered.
3. ———: **LICENSE: ORDINANCES.** Under the law governing the traffic in intoxicating liquors within the limits of cities and villages, such traffic can only be legally carried on under ordinances duly passed by the corporate authorities thereof. Until this is done no application can be made and no steps taken toward the procurement of a license to sell liquors within the limits of such corporation (*State v. Andrews*, 11 Neb. 523); but a general ordinance, applicable alike to all cases, fixing the amount of license fee to be charged, and prescribing the procedure to be followed in making the application, the hearing and issuance of the license is sufficient.
4. ———: **PETITION FOR LICENSE: COUNCILMEN: QUALIFICATION.** A petition for a license to A and B, consisting of the requisite number of signers, was signed by a member of the city council by whom the petition was to be heard, and presented to the city clerk. Upon the discovery that the signature of the councilman would disqualify him from acting on the application, his name was

Rosenberg v. Rohrer.

erased, the petition withdrawn, and another was filed asking for a license for B alone, and which was not signed by the councilman. *Held*, That signing the first petition disqualified the councilman, and that the erasure of his name and the withdrawal of the petition did not remove the disqualification.

APPEAL from the district court for Adams county:
HARRY S. DUNGAN, JUDGE. *Reversed with directions.*

J. W. James, R. A. Batty and H. F. Favinger, for appellants.

W. P. McCreary and M. A. Hartigan, contra.

REESE, C. J.

These cases are appeals from the judgment of the district court for Adams county in affirming the action of the city council of the city of Hastings, whereby licenses to sell intoxicating liquors were issued, severally, to each of the plaintiffs. The causes are separately briefed and presented here, but were argued and submitted at one hearing, and will all be disposed of in this opinion as each case appears to demand under the rules of law deemed applicable. A remonstrance was filed to each petition, some of the grounds of objection being common to all, one of which is that the petition is not signed by the requisite number of freeholders. This placed the burden of proof upon the applicant to show by competent evidence that the signers of his petition were all freeholders. *Lambert v. Stevens*, 29 Neb. 283; *Brown v. Lutz*, 36 Neb. 527.

The question then arises: Was this jurisdictional fact established by competent evidence? In Rosenberg's case, no one of the signers was called for the purpose of proving the fact of the necessary ownership of real estate; but the deputy assessor was called, who testified that he was acquainted with each of the petitioners, naming them, and that the petitioner resided in the proper ward of the city and owned real estate therein. He was then presented

with a deed conveying real estate to the petitioner, and identified the grantee named in the conveyance as the signer of the petition. The deed was then offered in evidence and admitted over the objection of the remonstrant. Thirty-one of such deeds were introduced bearing dates ranging from the year 1879 to that of 1907. Nothing was offered to show that no subsequent conveyances had been made, nor that the grantees named in the deeds had not been divested of their title. Was this sufficient, the fact of the competency of the signers having been denied? That the deeds were competent evidence must, we think, be conceded, for they would tend to establish the fact that the signers were, at one time, freeholders. But was that sufficient proof that they were such at the time they signed the petition in April, 1908? We think not. In *Batten v. Klam*, 82 Neb. 379, we held that the usual rules of evidence must be applied to the proof introduced to prove that the signers of the petition were freeholders, and that their affidavits were not competent for that purpose. It is said in the opinion: "One reason for the rule is that by the use of affidavits the adverse party has no opportunity to cross-examine the witnesses. This alone, we think, should be a sufficient reason for holding that the affidavits were incompetent. The remonstrators are as much entitled to examine the witnesses upon this question as upon any other issue which may be presented." It is true, as said in *Starkey v. Palm*, 80 Neb. 393, that the statutory requirement as to proof of the possession of a freehold estate in land is not that the evidence be so conclusive as would be requisite to enable the petitioners to recover in ejectment against an adverse claimant, yet the proof should be sufficient to establish, *prima facie* at least, the fact of the ownership of the legal title at the time of signing the petition. The evidence submitted may have been sufficient to prove title at a more or less remote time in the past, but it did not meet the requirements of the law.

There is in the record a certificate by the register of

deeds of Adams county that persons of the same names as those to the petition "are freeholders in the third ward of the city of Hastings," but there is no further or other identification of the parties, and, if there were, the certificate to the conclusion that they "are freeholders," without stating any facts, could not be sufficient. It follows that plaintiff did not show himself to be entitled to the license, and it should not have been issued.

In the case of the application of John Curry, we find the record the same as in the Rosenberg case, except that there is an additional certificate by the register of deeds, which contains no names, but certifies that "30 of the signers of the within petition are freeholders in the Third ward of the city of Hastings as the same now appears of record in this office." This certificate is attached to the petition. As it adds nothing to the force of the evidence, the same rule will have to be applied as in the Rosenberg case.

The record in the Schissler case is the same as in Rosenberg's, and the result must be similar, and therefore no further reference to it need be made.

The case of Nylon presents a like condition, with the exception that it was admitted of record that 15 of the 34 signers to the petition were freeholders of the Third ward of the city of Hastings. The result must therefore be the same.

In Freitag's case competent proof that the signers of the petition were freeholders in the Third ward of the city was either made, or the fact admitted. So far, then, as that question was concerned, the applicant was entitled to the license sought. However, other questions are presented which it is necessary to notice.

It is contended that there is no provision by statute permitting a license to be granted in a city of the class to which Hastings belongs; that the statute simply delegates the powers to the municipality, and that the city can act in a given case only by ordinance. The record shows that a general ordinance was passed in 1903, fixing

the license fee and providing the procedure to be followed, but, as we understand counsel, the claim is made that this is not enough, and that the license in no case can be authorized except by a special ordinance. *State v. Andrews*, 11 Neb. 523; and *Payne v. Ryan*, 79 Neb. 414, are cited in support of the contention. We do not understand those cases to so hold. It is true that provision must be made by ordinance for the issuance of licenses, but that provision may be made by a general ordinance, applicable to all cases, and when that action is taken the council may order licenses to issue when their provisions have been complied with. While the ordinance before us is not as specific as might be desired, yet we think it is sufficient to authorize the issuance of a license when the provisions of law and the ordinance are met. It is also insisted that the ordinance is insufficient for the reason that it does not provide punishment for its violation. This doubtless is unnecessary, as proper penalties may be, and no doubt are, provided in other ordinances.

The record of the hearing before the council presents an anomalous condition. The council consisted of eight members besides the mayor. Four voted in favor of the issuance of the license and four against, which created a tie. The mayor broke the tie by voting in favor of granting the license. Many objections were made by counsel for the applicant to evidence offered by the remonstrant, which were almost invariably sustained by the same vote. The disposition shown by four of the councilmen and the mayor to exclude the evidence offered by the remonstrant, some of which was clearly competent, cannot be commended.

It is shown by the record that Mr. C. L. Alexander was a member of the council at the time of the hearing of the application for the license, and that he had been such member for some time previous; that, a short time before the filing of Freitag's petition, a petition for a license had been presented by William Janssen and John R. Freitag; that said John R. Freitag for whom that petition was

presented is the applicant in this case; that C. L. Alexander, while acting as councilman and holding the office, signed the petition of William Janssen and John R. Freitag for such license, but, learning that the remonstrant, Rohrer, had obtained a photograph of the petition showing his name as one of the petitioners, he had caused his name to be erased, when a new petition was filed praying for a license for Freitag alone, this new petition being the one presented in this case. Upon the hearing of the application for the license, counsel for remonstrant objected to councilman Alexander sitting in the case, for the reason that during the municipal year he had signed a petition for the same petitioner and was therefore disqualified. The objection was overruled, and Alexander voted in favor of the issuance of the license. Had he refrained from voting, the majority would have been adverse to the petitioner, and the license would have been refused. By voting, he created the tie, and the opportunity was presented for the mayor to give the casting vote, which he did in favor of the license, and it was therefore issued.

The question is: Was Alexander disqualified by having signed the previous petition? Upon this inquiry we are of the unanimous opinion that he was disqualified; that his vote was void; and that, such vote changing the result, no valid license could issue. In *Vanderlip v. Derby*, 19 Neb. 165, two of the members of the village board had signed the petition, and it was held that they were disqualified. The same was held in *State v. Weber*, 20 Neb. 467; *State v. Kaso*, 25 Neb. 607; *Foster v. Frost*, 25 Neb. 731, and *Powell v. Egan*, 42 Neb. 482. In the latter case the members of the board had signed the petition, but it was afterwards withdrawn, their names erased and others substituted, and the petition refiled. It was held that the erasure of the names and the substitution of others did not remove the disqualification. In the opinion it is said: "The reason of the rule is that the village board acts judicially (*Hollembaek v. Drake*, 37 Neb. 680), and that by the petition for a license a signer declares, if not his

interest in the issuing thereof, at least his conviction that a license should issue, and of the existence of facts warranting the issuing of the license. He cannot, therefore, sit in judgment upon these questions and occupy the position of a disinterested person. The general principle is conceded by the defendant in error, but he contends that when the petition was withdrawn and the names of three of the trustees 'erased and withdrawn' from the application their disqualification was removed, and they were not forbidden to act upon the petition when refiled, it being then in effect a new application. To so hold would be a veritable 'clinging to the bark.' The disqualification of signers does not ultimately depend on the fact that their names appeared as petitioners. It is based upon the fact that they were interested parties, or at least parties who have prejudged the case, and of this their signing the petition is conclusive evidence. The withdrawing of the petition and mechanical erasure of their names and the refiled of it with other names in their places did not alter the fact and did not avoid the principle upon which their disqualification is based."

We think it must be conceded that the rule above stated must be applied with full force to this case. In the former petition the councilman certified (to himself) that Janssen and Freitag "are men of respectable character and standing," and he "therefore pray(s) that a license to sell malt, spirituous and vinous liquors during the municipal year 1908" issue to them. This certificate and prayer are not in any sense weakened in effect by the fact that another name is coupled with the present applicant. He had already decided and certified that Freitag is a proper party to receive the license. What more or what greater advantage could any litigant desire, if untrammelled by conscience, than would be offered in such a case? In so far as the trier of fact in such a case would be concerned, the favored litigant would be certain of the decision, for "the court" would already be convinced as to the proper solution of the ultimate issues.

Hoover v. Deffenbaugh.

We are not surprised that the attorneys representing the petitioner should, in their justification, state to the mayor and council that they had no knowledge of the existence of the former petition with the name of the councilman attached until the close of the case, when they, with commendable candor, called for and introduced the petition in evidence.

It is contended by the appellee that this court is without jurisdiction to entertain this appeal, for the reason that the statute does not provide for the proceeding. An unusually able argument was made at the bar of this court in support of this contention. It is not deemed necessary for us to enter upon this inquiry at any great length, for the reasons that ever since the enactment of what is familiarly termed the "Slocumb Law," in 1875, it has been the practice of the court to review such cases. This has become a part of the jurisprudence of the state, and it cannot now be departed from. It follows that the district court erred in its judgment in each of the cases, and they are severally reversed and the causes remanded to that court, with directions to reverse the judgment and decision of the city council, order the licenses canceled, and that the costs be taxed to the petitioners.

JUDGMENT ACCORDINGLY.

ABRAHAM L. HOOVER ET AL., APPELLEES, v. JAMES M.
DEFFENBAUGH ET AL., APPELLANTS.

FILED FEBRUARY 20, 1909. No. 15,510.

1. **Waters: WATER RENTALS.** The plaintiffs, proprietors of a hotel in the city of Lincoln, in the year 1898 installed their own water system to supply their hotel, which had thertofore been connected with the water mains of the city by a service pipe three-fourths of an inch in diameter, on which the water commissioner had placed a meter to register the amount of water used. The

city water was thereupon turned off at the curb, but was turned on from time to time, with the knowledge and consent of the water commissioner, to enable the plaintiffs to repair their pump, and in 1901 was not again turned off, but was left in that condition until some time in September, 1904, when in making some alterations to the hotel the meter was disconnected without plaintiffs' knowledge, and so remained until August 18, 1905. On the discovery of that fact, the city demanded from the plaintiffs the payment of what it called a "flat rate," based on the number of taps or faucets in the building from September, 1898, to August 18, 1905, amounting to the sum of \$6,203.75, and threatened, in default of immediate payment of that amount, to turn off the city water from their hotel. *Held*, That such demand was unreasonable and unjust, and that the city was not entitled to enforce the same.

2. —: —: INJUNCTION. Plaintiffs brought suit to restrain the city from turning off the water, and offered to pay for the amount of water actually used and consumed during the time the meter was so detached. *Held*, That although the amount of water actually used during that time was not susceptible of exact measurement, yet it could be approximately obtained by a comparison of the amount of water used after the meter was replaced, and the evidence of disinterested witnesses as to its previous use, and that the amount so found by the district court was reasonable and just, and upon payment thereof to the defendants the plaintiffs were entitled to an order restraining them from cutting off the city water from their hotel.

APPEAL from the district court for Lancaster county:
EDWARD P. HOLMES, JUDGE. *Affirmed*.

John M. Stewart and T. F. A. Williams, for appellants.

Hall, Woods & Pound and Charles O. Whedon, contra.

BARNES, J.

This is a suit in equity brought in the district court for Lancaster county by Abraham L. Hoover and Stephen C. Hoover against the city of Lincoln and its water commissioner, J. F. Deffenbaugh, to enjoin them from turning off the supply of city water from the Lindell Hotel, and for an accounting of the amount due from the plaintiffs to the city of Lincoln for water used from Septem-

ber, 1904, to the 18th day of August, 1905, which amount the plaintiffs offered to pay. The plaintiffs had judgment, and the defendants have appealed.

The petition sets out, in substance, that the plaintiffs are the owners and proprietors of the Lindell Hotel; that prior to December 10, 1907, they obtained their water supply from the city water main on the M street side of the hotel; that about that date they put in a water system of their own, obtaining their water from a well on their own premises by pumping and piping it through the hotel; that to provide for a supply of water in emergencies, in case of accident or injury to the plaintiffs' plant, they had their water system connected with the city main by a pipe three-fourths of an inch in diameter, and the defendants duly installed a meter thereon, as required by the city ordinance of the city of Lincoln; that, by means thereof, the water which passed from the city main into their hotel, and every part thereof, was duly registered and measured; that in September, 1904, the location of the pipe connecting the two systems, by reason of certain improvements then being made in the hotel, had to be changed, and in so doing, without the knowledge or consent of the plaintiffs, the meter was disconnected by some person or persons unknown to the plaintiffs, and that they had no knowledge of that fact until the 18th day of August, 1905; that all the city water registered down to the time of the removal of the meter, and which was all the city water used by the plaintiffs during said period, amounted at ordinance rates to a sum not exceeding \$40; and that after such removal, and down to August 18, 1905, in case of emergencies or of accident to the pumping machinery in plaintiffs' water system, their employees occasionally and without plaintiffs' knowledge used small quantities of city water, the exact amount unknown, but no more was used than in the years 1897 to 1904, when the said meter was in place; that on August 18, 1905, the city water was shut off, a meter was installed September 1, 1905, and the water was turned on

again to be used pending a settlement; that plaintiffs have been and now are ready and willing to pay the city the full amount due it according to its rates in force therein for all water taken from said city mains and used in and about their hotel building down to the said 18th day of August, 1905; that the city insists that the plaintiffs pay a flat rate, regardless of the amount of water used, based on the number of taps or faucets in the building from September, 1898, to August 18, 1905, amounting to the sum of \$6,203.75. The petition further alleged that the defendant Deffenbaugh threatens "and is about to turn off the city water from plaintiffs' hotel, and prevent them from using the same, or getting any benefit or advantage from or by reason of the system of waterworks operated by the city for the benefit of all the citizens and inhabitants thereof"; that by reason thereof, in case of accident or injury to the plaintiffs' water system, their hotel would be left wholly without water, and it would be impossible to operate the same in such case without the use of city water; that, if plaintiffs are deprived of such use in case of emergency, they will be put to great hazard and loss, and their business will be destroyed; that they will be compelled to close up their hotel and cease operating the same, and thereby suffer great and irreparable loss and injury; that the said defendant Deffenbaugh on or about the 1st day of March, 1906, served a notice upon the plaintiffs, demanding that they pay to him for the said city, the exorbitant and unreasonable sum of \$6,203.75, and that unless such sum was paid on or before 4 o'clock on the 2d day of March, 1906, he would turn off the city water and cut their hotel off from all access thereto; that the plaintiffs are solvent, ready, and willing to pay any sum reasonably due for city water actually taken and used in said hotel. The petition concluded with a suitable prayer for relief.

The defendant city and its water commissioner answered plaintiffs' petition, first, by certain admissions and special denials, and for affirmative defense to the

plaintiffs' action, by way of cross-petition, alleged, in substance, that on and prior to the 1st day of September, 1898, the plaintiffs' hotel was connected with the defendant city's water mains by means of a supply pipe extending from such water mains in the street into plaintiffs' building; that the connection of said supply pipe was constructed so as to be served by means of turning a stopcock at the water main in the street; that on the last named date the defendants, at the request of the plaintiffs, turned off said stopcock in the street, and disconnected and shut off the water from the plaintiffs' hotel, and the same was not between said date and the first day of September, 1905, turned on or connected by defendants with their knowledge and consent; that the plaintiffs without the knowledge and consent of defendants or any of them, and with intent to defraud the city of Lincoln, wrongfully and fraudulently in violation of the ordinance of the city caused the said stopcock to be turned so as to allow the water from defendants' mains to run into the supply and surface pipe connecting with plaintiffs' hotel, and thereby caused their hotel to be supplied with water from defendants' mains, and by means of said connection caused their said hotel to be supplied with all of the water used by plaintiffs in and about their hotel from defendants' mains from September 1, 1898, to August 18, 1905, without the knowledge or consent of the defendants or any of them; that after the 1st day of September, 1898, and after defendants had disconnected and turned off the water from the plaintiffs' hotel, the defendants, having no reason to believe that plaintiffs were using water from the city main, made no inspection or reading of the meter through which such water would properly pass in entering said hotel; that such meter by means of plaintiffs' wrongful and fraudulent manipulation, and by reason of its becoming out of repair, failed to register and preserve for reading the amount of water passing through the supply pipe connecting the water mains with plaintiffs' hotel, and failed to register and preserve for reading the amount

of water so actually used by plaintiffs; that afterwards, and on or about the — day of September, 1904, the plaintiffs removed the said meter wrongfully and fraudulently, without the knowledge of the defendants or any of them, connected their supply pipe direct with the water mains, and fraudulently and surreptitiously drew all of the water used in their hotel until on or about the 18th day of August, 1905, when defendants incidentally discovered the wrongful and fraudulent connection, and disconnected the same and turned off said water; that prior to the last named date defendants had no knowledge and no reason to believe, and could not by the exercise of reasonable diligence have discovered, plaintiffs' said wrongful and fraudulent acts in making the connection with the water mains and their subsequent use of the water therefrom; that after the discovery of such wrongful and fraudulent connection on the 18th day of August, 1905, the plaintiffs duly installed a meter under the ordinance of the defendant city.

The defendants also set out the city ordinances in force from and after the year 1895, defining the powers and duties of the water commissioner, and prescribing water rates, together with the rules governing its use. The answer further alleged that there was due from the plaintiffs from September 1, 1898, to August 18, 1905, the sum of \$7,035.57; that under the ordinance there was due in addition to said amount a penalty of 10 per cent. interest, and 7 per cent. per annum from the time when the same became due, amounting in the aggregate to \$10,000, which it demanded from the plaintiffs, and prayed that it be permitted to turn off the water from plaintiffs' hotel and sever the connection of said hotel with the city water mains unless plaintiffs paid that amount. Defendants also prayed that an account might be taken of the amount due the defendants under its ordinances on account of the plaintiffs' connection with the city water mains, and "*for the water used,*" for judgment therefor; that the

judgment be made a lien upon the plaintiffs' real estate, and that the injunction prayed for by the plaintiffs' petition be denied, and for general equitable relief.

The plaintiffs for reply to defendants' cross-bill alleged that on August 23, 1899, they paid to the city the sum of \$3.15, being the full amount then due according to the meter which the city had installed to measure the amount of city water used by them in their hotel. They also averred their willingness to pay for whatever amount of water was used by them at regular meter rates of 15 cents a thousand gallons as provided by the city ordinance of 1895, and denied each and every allegation in the answer or cross-petition that was not by their reply expressly admitted.

Upon a trial of the issues above stated the district court found, in substance, that the plaintiffs from the 1st day of September, 1898, to the 1st day of September, 1905, maintained their own water supply for their hotel, with the exception of a short time on different occasions when it was necessary to remove their pump for repairs, and on a few other occasions when a small amount of water was used for priming their pump or other purposes; that the meter on the water connection was, on or about the 1st day of September, 1904, in lowering a floor of one of the rooms of plaintiffs' hotel, temporarily removed from its place; that the same had not been replaced when its removal was discovered on the 18th day of August, 1905; that the plaintiffs had no knowledge of the removal of the meter, and that, if the same was out of repair prior to its removal, plaintiffs had no knowledge thereof, and were without fault or neglect on that account; that it was the duty of the city authorities to inspect their meter and keep it in repair; that plaintiffs never concealed or attempted to conceal the use of the city water, and at all times believed that such water as they used was being registered by the meter placed upon their water connection; that they were ready and willing at all times to pay for any water used at the rate of 15 cents a thousand gal-

lons for all water consumed by them; that the value of the city water used by them during the said period amounted to \$180; that on or about the time this suit was begun defendants threatened to turn off the city water from the hotel unless plaintiffs would pay the sum of \$6,203.75; that said demand and threatened action was unjust, arbitrary and illegal; and thereupon rendered a decree requiring plaintiffs to pay to the defendants the sum of \$180; that each of the parties should pay their own costs, and that upon the payment of the sum so found due to the city the injunction was ordered to be made perpetual. From that judgment, the defendants, as above stated, have appealed.

A careful reading of the bill of exceptions satisfies us that the plaintiffs maintained the allegations of their petition by clear and convincing evidence. It also appears that in 1901, at the plaintiffs' request, the city water which had been turned off from their hotel in 1898 was turned on again, after notice to the defendants, in order to enable the plaintiffs to repair their pump; that it remained in that condition until August 18, 1905; that up to some time in the month of September, 1904, the meter theretofore mentioned and installed by the water commissioner was in place between the water main and plaintiffs' water system, so that all of the city water used by them flowed through the said meter; that without intentional fault on the part of the plaintiffs the meter was disconnected some time during the month of September, 1904, and remained in that condition until the 18th day of August, 1905; that from and after the last named date the meter was again installed, and that plaintiffs did not and could not obtain any water from the city other than that registered by said meter at any other time than the period above stated; that, when the mistake and the absence of the meter was discovered, plaintiffs offered to pay for any and all city water used by them, and offered to adjust the matter and settle with the city therefor on any fair, reasonable and equitable basis, but said over-

Hoover v. Deffenbaugh.

tures and offers were rejected. We therefore have no hesitancy in saying that the facts found by the district court are fully sustained by the evidence, and, for that reason, we adopt such findings as our own.

On the other hand, the defendants failed to establish their affirmative defense, and it would seem from their present contention that they are fully aware of that fact, for they now submit two principal questions for our determination: First. What constitutes the consideration for which the plaintiffs should pay? Second. At what rate should they be required to make payment to the city?

Referring to the question first above stated, it is contended by the defendants that the city is entitled to charge, collect and receive, without regard to the amount of water used by plaintiffs, a special or additional compensation for what they style "readiness to serve." In support of this contention defendants have cited the case of *Cox v. Abbeville Furniture Factory*, 75 S. Car. 48, 54 S. E. 830. That was a case where the water company furnished a furniture company with water for use in its special private system of fire protection without an agreement fixing the liability therefor. It appears that the furniture factory was situated some distance away, and across a certain railroad track, from the regular mains of the water company, and by an agreement the company laid a private main from its regular system, extending across the railroad track to the factory, where it connected the main with the special system of fire protection, called "automatic sprinklers." In an action to recover the value of the service, it was held that the water company was not obliged to furnish water without charge to be used in a special private system of fire protection instituted by a private corporation for the security of its own property; that, where a water company furnished water for such use without an agreement fixing the liability therefor, it was entitled to reasonable compensation for such protection whether water was used or not; that the term "minimum charge," as used in water supply

contracts where the meter system obtains, usually signifies rate of compensation for expense and labor of being ready to supply water at will of the consumer, though the supply had not been used at all. In the case at bar there is no contention that the plaintiffs are afforded any special fire protection other and different from that enjoyed by all other property owners of the defendant city. They maintain no automatic sprinkler system, and the only water service they ever had up to the 1st day of September, 1905, was such as was afforded by an ordinary pipe three-quarters of an inch in diameter connecting their hotel with the city mains. This is no other or different service from that given to stores, residences, hotels and ordinary private consumers. The defendants having furnished no specific protection to the plaintiffs other and different from that to which the citizens of the city of Lincoln were entitled in common, their only liability for what is called by defendants "readiness to serve" is the payment of 50 cents a month, which is the minimum charge fixed therefor by the ordinance of 1895.

Under the last assignment, the defendants contend that the amount of water actually furnished to and used by the plaintiffs is wholly immaterial; that, having wrongfully removed the meter furnished by the city, they are guilty of fraud, and the city is therefore entitled to charge, collect and receive what they call a "flat rate" from September, 1898, to September, 1905, regardless of whether any water was used or not. In support of this contention defendants cite the case of *Krumenaker v. Dougherty*, 77 N. Y. Supp. 467. That was a case where the plaintiff's premises were found to be supplied with a properly metered service pipe, and also with an unmetered service pipe, through which water had been illegally drawn; the pipes being so arranged that by closing a stop-cock water could be obtained through the unmetered pipe without any disturbance of the meter. On a disconnection of the unmetered pipe for several days the amount of the water registered was much greater than before. The

owner denied any illegal use of water, but offered to compromise a bill tendered him for water illegally used. The bill tendered was for an unjust and exorbitant amount, accompanied with a threat to turn off the water from the plaintiff's premises. He thereupon commenced a suit in equity, alleged the facts, offered by his bill to pay for the amount of water actually consumed, and prayed for an injunction restraining the defendant from turning off the water. It was held that the plaintiff was guilty of an illegal appropriation of water; that it was proper to determine the amount for which the plaintiff was legally liable for such illegal use by a comparison of the quantity which the meter had registered with amounts registered during a week when the unmetered pipe was disconnected, taken together with the volume of the user's business; and that, upon a failure to pay the amount so found due for water illegally taken through the unmetered pipe, the city was entitled to cut off the plaintiff's water supply. It will thus be seen that it has been decided in a suit like the one at bar that the amount of water used is what the plaintiffs should be charged with, and that amount, although not susceptible of an exact measurement, can be approximately obtained by comparison.

Finally, our attention is directed to the case of *Gordon & Ferguson v. Doran*, 100 Minn. 343. That was a case where a property owner had installed what is called the "automatic sprinkler system," and had connected it at his own expense with the water mains, and was not entitled to take water in any case, except of fire. It was held that he obtained a beneficial use of water not common to the public in general, and the water board was entitled to make a reasonable and impartial charge for the valuable and special privilege thus conferred; that the board would not be permitted to enforce illegal rates by severing the connection from such sprinkling devices, and that courts will interfere by injunction or otherwise to protect the public and individuals entitled to water service against unreasonable charges or discriminations made by public

utility corporations or bodies. If the decision in that case has any bearing at all upon the questions involved in this controversy, it seems to favor the plaintiffs' contention that they are entitled to the injunctive process of the court to restrain the city from enforcing what they allege to be an unjust, unreasonable and exorbitant demand by cutting off the city water from their hotel.

It is also claimed by the defendants that the meter installed by the city on the service pipe entering the plaintiffs' hotel, when they established their own water system in 1898, failed to register the amount of water passing through it; that it was dead, or, in other words, out of commission, and the plaintiffs had thus been enabled to surreptitiously obtain water from the city mains. The evidence fails to establish this contention. It appears that up to the year 1900 the water commissioner looked after the meter in question; and from time to time obtained its readings, and from such readings presented a bill to the plaintiffs in August, 1899, which was duly paid. It would seem, however, that this bill was for such a small amount that thereafter the city failed to read the meter. It was shown, however, that at one time a person charged with that duty went to the hotel, where he was informed that he could find the meter by following the water pipe; that he refused to look for it, and went away without making any attempt to find it. Now, if the meter was dead, that fact could have been easily ascertained by the city by the ordinary and usual test, and, if defendants really believed that the meter was out of commission, we are unable to see why they did not make such a test, so as to be able to prove that matter to a reasonable certainty.

It was evidently the opinion of the trial court that both parties to this action were to some extent, in the wrong, and therefore in an action in equity it was improper to enforce any of the unjust and inequitable demands presented by the defendants. It appears that the district court compared the amount of water used for three months after both meters were installed with the testi-

Mahoney v. Salisbury.

mony of disinterested witnesses who knew the facts relating to its previous use, and by adding thereto the minimum charge for readiness to serve obtained the amount which the decree required plaintiffs to pay as a condition for the relief prayed for by their petition. So far as we are able to ascertain, this might reasonably have been a less amount. The witnesses for the defendants, engineers and assistant engineers, who were employed at the plaintiffs' hotel during all of the time in question, who are not now so employed, and who appeared in many instances to be hostile to the plaintiffs, testified that there was a stopcock on the surface pipe, between the meter and the city main, by which they could turn on or shut off the city water, and which they used for that purpose when it was necessary to take such water to prime the plaintiffs' pump, and while it was undergoing repairs; that they had strict orders not to use city water, except such as was necessary for those purposes, and that they obeyed their orders implicitly.

We therefore adopt the finding of the district court as to the amount and value of the city water used by plaintiffs, and for which they should be required to pay as a condition for the relief prayed for by them, as our own.

A careful examination of the record satisfies us that the judgment of the district court is fully sustained by the evidence, is a just and equitable one, and it is therefore in all things

AFFIRMED.

JAMES P. MAHONEY ET AL., APPELLANTS, V. FRANK SALSBURY ET AL., APPELLEES.

FILED FEBRUARY 20, 1909. No. 15,554.

1. **Quieting Title: DEEDS: ATTACHMENT: PRIORITIES.** D. in good faith purchased a tract of land of W., paying him in full the agreed price therefor. W. thereupon executed and delivered to D. his warranty deed for said land, leaving the name of the grantee

Mahoney v. Salsbury.

therein blank, with the understanding that, if one M. should desire to take the land and immediately repay D. the purchase price, his name was to be inserted in the deed as grantee; but, if M. should fail to take the land, then D. was to insert his own name therein. M. failed to pay for the land at the time agreed upon, and the name of D. was inserted therein as grantee. *Held*, That the deed when thus completed conveyed the land to D., and his title thus obtained was paramount to the liens of attachments subsequently levied thereon.

2. **Deeds: RECORDING: PRIORITIES.** A prior unrecorded deed, passing the legal title to the real estate in good faith and for a valuable consideration, will take precedence of an attachment or judgment, if such deed be recorded before any deed based upon such attachment or judgment. *Harral v. Gray*, 10 Neb. 186.
3. **Attachment: MOTION TO DISSOLVE: TITLE TO REALTY.** The question of the ownership of real estate cannot be adjudicated on a motion to dissolve an attachment. The issue of fact in such a proceeding is not whether the attachment debtor owns the property, nor whether his grantee has an unimpeachable title or interest therein.

APPEAL from the district court for Butler county:
ARTHUR J. EVANS, JUDGE. *Reversed with directions.*

L. C. Burr and T. J. Doyle, for appellants.

Aldrich & Fuller, contra.

BARNES, J.

Plaintiffs brought this action in the district court to quiet title to a tract of land situated in Butler county. Defendants Salsbury, Lemon and Brown answered, setting up certain proceedings and judgments in attachment, in which they were plaintiffs and the defendant Joseph Wells was the defendant, by which they alleged that they had obtained liens upon the land in question which were prior and superior to the rights of the plaintiffs. Defendant Wells answered, claiming to be the owner of the premises, and alleged that he had been induced by duress, coercion and fraud practiced upon him by the plaintiffs and others to convey the land in question to the plaintiff Doyle, and prayed that his conveyance

Mahoney v. Salsbury.

be set aside and held for naught, and that the title to said land, as against the plaintiffs, be quieted in him. The district court rendered a decree in favor of the plaintiffs and against defendant Wells dismissing his cross-petition, and in favor of the defendants Salsbury, Lemon and Brown sustaining their attachment proceedings, and dismissing the plaintiffs' action as to them. From that part of the decree the plaintiffs have appealed. Wells prosecutes no cross-appeal, and therefore the *bona fides* of the sale and conveyance by him to the plaintiff Doyle is as between them not now an open question.

The testimony contained in the bill of exceptions we think fairly establishes the following facts: That on and prior to April 15, 1905, the defendant Joseph Wells was the owner of the northeast quarter of section 19, in township 13, range 2 east of the sixth P. M., in Butler county, Nebraska, together with certain other land; that he resided at that time in Denver, Colorado, and prior to that date had corresponded to some extent with plaintiffs about a sale of his land to the plaintiff Mahoney; that Doyle, acting in the capacity of agent for Mahoney, accompanied by one L. C. Burr, went to Denver to see Wells about the matter, and on the date last above mentioned purchased the land from Wells, paying him therefor \$4,550 in cash, and assuming mortgages, interest and taxes, which were liens on the land, amounting to \$6,250; that Wells thereupon executed and delivered to Doyle a warranty deed to said premises, complete in all respects, except the name of the grantee, which was left in blank. It appears that it was understood by Wells that the name of the grantee was to be left in blank solely for the reason that Doyle was not certain that Mahoney would complete the purchase according to their previous agreement, and, having paid his own money for the land, it was deemed best, in case of delay on the part of Mahoney or of his failure to complete his proposed purchase, for Doyle to take title to the land himself. Doyle returned from Denver to Lincoln on the 16th day of April, 1905, bringing

the deed in question with him. On Monday, April 17, he went to Greeley, Nebraska, to attend court, and instructed Mr. Burr, who was familiar with the transaction, to close the deal with Mahoney, if he was prepared to take the property and pay for it on that day, and insert his name in the deed, but, if for any reason Mahoney failed to complete his purchase at that time, to insert Doyle's name in the deed as grantee, and send it to Butler county for record. It further appears that Mahoney came to Lincoln on the 17th day of April, but was unable to complete his purchase at that time; that Burr on that date inserted Doyle's name in the deed as grantee, and the same was thereafter forwarded to the county clerk of Butler county for record, and was recorded on the 22d day of April following.

On the 20th day of April defendants, Salsbury, Lemon and Brown commenced attachment suits in the district court for Butler county against the defendant Joseph Wells, and on the day following said attachments were levied upon the 160 acres of land in question herein as the property of defendant Wells. The attachment suits were commenced on claims not then due, and the grounds therefor, as set forth in the affidavits, were that Wells was a nonresident of this state, and that he had sold, incumbered and disposed of his property with intent to defraud his creditors. Wells appeared by the plaintiff Doyle as his attorney, and moved to dissolve the attachments. In support of his motions, he set forth by affidavit the *bona fides* of the transaction by which he conveyed the land in question to the plaintiff Doyle on the preceding 15th day of April. The motions to dissolve were overruled, and no other or further appearance was made in the attachment suits. Judgments were rendered therein against the defendant Wells, and the attached property was ordered to be sold. On the 1st day of May, 1905, Mahoney procured the money necessary to purchase the land in question, and paid the same to Doyle, who thereupon conveyed it to him by a warranty deed. Thereafter the plaintiffs com-

Mahoney v. Salsbury.

menced this action to restrain the defendants Salsbury, Lemon and Brown from proceeding further in said attachment suits, from selling the land under the orders of attachment above mentioned, and to quiet their title to the same as against the defendants, said attachment creditors.

It further appears that at the time of the execution and delivery of the deed in question defendant Wells also executed and delivered to the plaintiff Doyle the following instrument in writing: "Roy Parks: For value received I have this day sold, assigned and set over to Thomas J. Doyle of Lincoln, Nebraska, all my right, title and interest, claim and demand in and to the lease under which you occupy the above named premises, and you not having paid me any rent due under said lease for the year 1905, or subsequent thereto, you will please pay the same and all thereof to him, and recognize him as your landlord, and any and all courtesies you may extend to him will be thoroughly appreciated by yours truly, Joseph Wells." On the 17th day of April, 1905, Doyle communicated to Parks, who was in possession of the land in controversy as a tenant, the fact of his purchase and the assignment of the lease to him, and from that time on was recognized by Parks as the owner of the premises.

It is contended that the deed executed by Wells to Doyle on the 15th day of April, 1905, with the name of the grantee in blank, was for that reason void and conveyed no title to Doyle; that, therefore, the land still belongs to Wells, and is subject to sale under the orders of attachment. This contention might be sustained if it were shown that Doyle had no authority to insert the name of the grantee in the deed, but we are satisfied from the evidence that Doyle had such authority. Not only is that fact testified to by him and by Burr, but all the circumstances surrounding the transaction point unerringly to the fact that it could not then be determined with certainty whether Mahoney would complete the purchase

according to his agreement, or whether it would be necessary for Doyle to take title to the land himself, and therefore the deed was executed in blank as to the name of the grantee. Doyle having authority to insert the name of the grantee in the deed, when that act was performed by Burr, and Doyle's name was inserted, the deed became complete in all respects and conveyed an absolute title to the land to Doyle. *Field v. Stagg*, 52 Mo. 534; *Van Etta v. Evenson*, 28 Wis. 33; *Devin v. Himer*, 29 Ia. 297; *Swartz v. Ballou*, 47 Ia. 188; *Campbell v. Smith*, 71 N. Y. 26; *Phelps v. Sullivan*, 140 Mass. 36.

In *Devin v. Himer*, *supra*, the grantor in a deed omitted the name of the grantee, not knowing the full name, and left a blank therefor. The deed in this condition was delivered by him to the grantee, who thereafter by his attorney filled the blank with his name, and it was held that it was a sufficient execution and delivery of the deed.

In *Reed v. Morton*, 24 Neb. 760, we held that, where a wife executed a deed of her real estate, leaving the name of the grantee, the amount of consideration and the date blank, and delivered it to her husband for the purpose of enabling him to sell and convey said real estate, such deed, duly filled up, in the hands of a *bona fide* grantee, who purchased the land from the husband, and paid the consideration therefor, should be sustained. We think the rule announced in the foregoing cases is upheld by the great weight of authority, and the defendants' contention on this point cannot be sustained.

It appears, however, that this deed was not recorded until the day following the levy of the attachments, and it is therefore contended that the liens of the attachments are paramount to the title conveyed to Doyle by said deed. In *Harral v. Gray*, 10 Neb. 186, we held: "A prior unrecorded deed, passing the legal title, made in good faith and for a valuable consideration, will take precedence of an attachment or judgment, if such deed be recorded before any deed based upon such attachment or judgment." "his rule is supported by *Mansfield v. Gregory*, 11 Neb.

Mahoney v. Salsbury.

297, and *Hubbart v. Walker*, 19 Neb. 94. In *Uhl v. May*, 5 Neb. 157, a case where the legal title to the real estate was in the judgment debtor, and such real estate was in the possession of another party, it was held that the lien of the judgment attached only to the interest of the judgment debtor therein, and that possession of land is notice to all the world, not only of the possession itself, but of the right, title and interest, whatever it may be, of the possessors. We find that the rule announced in *Harral v. Gray*, *supra*, was approved in *Naudain v. Fullenwider*, 72 Neb. 221, and seems to be the settled law of this state. It follows that, if the deed from Wells to Doyle was made in good faith and for a valuable consideration, then it takes precedence, though unrecorded, over any lien which the defendants Salsbury, Lemon and Brown obtained by reason of their attachment proceedings.

It is contended, however, that the deed in question was not made in good faith, and that Doyle never purchased the land in controversy. We fail to understand how any such contention can be made in face of the evidence contained in the record. That Doyle paid the entire purchase price for the land to the then owner Wells on the 15th day of April, 1905, is not questioned or disputed. It is not claimed that this was not the fair market value of the land, and, at most, it can only be claimed that he was not acting for himself, and did not purchase the land, but was simply negotiating to purchase the same for the plaintiff Mahoney. The evidence does not sustain this claim. Doyle evidently purchased the land outright, and, when the transaction was completed, Wells no longer had any interest therein. If this be true, then the deed given to Doyle, as soon as his name was inserted therein as grantee, conveyed the title to him, and he was not only the owner of the land, but was in possession of it by and through his tenant, Roy Parks, for at least four days prior to the levy of the attachments in question herein. At the time of the commencement of those suits Wells had parted with all the interest he ever had in the land,

and had in fact conveyed it to the plaintiff Doyle. It is insisted, however, that the judgment of the district court should be affirmed, because Mahoney had notice of the commencement of the attachment suits on the 20th day of April, 1905, and before he purchased the land from Doyle. If, as we have held, Doyle was at that time the owner thereof, and had the legal title thereto, notice to Mahoney could in no manner affect his rights, and, when Mahoney purchased and took title from Doyle, he obtained the same title and interest that Doyle had thereto.

It is also contended that the sale of the land in controversy from Wells to Doyle was made fraudulently, with intent to cheat and defraud his creditors. We find no evidence in the record tending to establish this fact. Much evidence was introduced by the defendants by which they attempted to show that in the transaction complained of Doyle, together with others, conspired to cheat and defraud the defendant Wells out of his land. No evidence was introduced showing or tending to show that Doyle was aware of the fact that Wells was owing any debts other than those which he assumed as a part of the purchase price of the land in question, and the other claims which Wells secured by a mortgage upon another eighty-acre tract of land. So far as Wells is concerned, it is not shown that he had any intention or desire to defraud his creditors or any of them; that his purpose in making the sale to Doyle was to pay debts and obtain \$5,000 to invest with other property he had in purchasing a half interest in a store in Denver. It further appears that Wells since that time has paid a part at least of one of the debts which was the basis of the attachment suits. The fact that the business in which Wells engaged afterwards turned out to be unprofitable is not sufficient of itself to establish the claim that the sale to Doyle was made with intent to defraud creditors.

Finally, it is contended that the *bona fides* of the sale from Wells to Doyle was determined in the attachment suits, and is now *res judicata*. In other words, that plain-

tiffs are bound by the judgments in those cases, and are now estopped to claim that their title is superior to the attachment liens. It appears that neither of the plaintiffs were parties to those suits; therefore it would seem clear that they are not bound by the proceedings therein. But it is contended that because the plaintiff Doyle appeared as attorney for the defendant in those actions for the purpose of securing a dissolution of the attachments, and filed affidavits relating to the sale of the land from Wells to himself, he became privy thereto, and is bound by the orders overruling the motions to dissolve. We think the question of the *bona fides* of the transaction between plaintiff Doyle and defendant Wells relating to the sale and purchase of the land in question was not a point, nor could it have been made a point, in issue in the attachment suits. In *Kimbrow v. Clark*, 17 Neb. 403, it was said: "The question of the ownership of the real estate cannot be adjudicated by the intervention of the holder of the title, that question not being involved in any degree in the action. In such case a judgment against the maker of the promissory note, and an order that the attached property be sold, will not debar the holder of the legal title from afterwards claiming title to the real estate." In *South Park Improvement Co. v. Baker*, 51 Neb. 392, it was held: "The issue of fact in a proceeding to discharge an attachment is not whether the attachment defendant owns the property, nor whether his grantee has an unimpeachable title or interest therein." In *Kountze v. Scott*, 49 Neb. 258, it was said: "A debtor who had transferred all his interest in property subsequently attached, to one who is not a party to the attachment suit, cannot, in his own name and right, be permitted, on motion for a dissolution of the attachment, to establish the validity of his transfer." See, also, *Meyer, Bannerman & Co. v. Keefer*, 58 Neb. 220. It seems clear from the foregoing authorities that the plaintiffs are not bound by the proceedings in the attachment suits, and

Pethoud v. Gage County.

the defendants' contention on this point cannot be sustained.

From a careful examination of the whole record, we find that the plaintiffs have shown themselves entitled to the relief prayed for by their petition, and we find generally in their favor upon the issues joined. It follows that so much of the judgment of the district court as dismissed their petition and refused them any relief should be, and the same hereby is, reversed, and the cause is remanded, with directions to the district court to render a decree quieting their title to the real estate in controversy, as prayed for by their petition.

JUDGMENT ACCORDINGLY.

ANDREW J. PETHOUD, APPELLEE, v. GAGE COUNTY; B. C. BURKETT, APPELLANT.

FILED FEBRUARY 20, 1909. No. 15,557.

1. **Counties: CONTRACTS.** G. county was engaged in litigation in the district court involving fraud in bridge contracts. The county board adopted a resolution authorizing the county attorney to call to his assistance competent persons to examine the bridges and check up the claims which had been allowed and were pending on bridge contracts in that county for the preceding four years. He called to his aid one P., who was at that time county surveyor. The services were performed, and P. filed a claim with the county board for payment therefor. His account was allowed. B., a taxpayer, appealed from the order of allowance to the district court. The claimant there had judgment. On appeal to this court, *held*, that the transaction was not within the inhibition of section 4469, Ann. St. 1907, and that the claimant was entitled to recover the value of his services.
2. **Case Distinguished.** *Wilson v. Otoe County*, 71 Neb. 435, distinguished.

APPEAL from the district court for Gage county: WILLIAM H. KELLIGAR, JUDGE. *Affirmed.*

A. D. McCandless, for appellant.

E. O. Kretsinger, contra.

BARNES, J.

This is an appeal from a judgment of the district court for Gage county.

It appears that in the year 1906 certain actions were pending in the district court for that county relating to frauds in bridge building, in which the interests of the county were at stake; that on the 16th day of June of that year the county board duly adopted a resolution authorizing the county attorney to take such steps and employ such means as were necessary for the purpose of checking up all claims, either pending or which had been settled, and examining all bridges that had been constructed for the county during the preceding four years. Thereupon the county attorney requested the plaintiff, now the appellee, and another to perform such work. The services were duly performed, and the plaintiff presented a bill to the county board for the time spent in the field while making his examinations, which was allowed and paid. He thereupon prepared and furnished to the county attorney for the use of the county in conducting said litigation a written report of the conditions found by him, and presented his claim therefor, amounting to \$67.50, to the county board, which was also allowed. The objection interposed to the claim was that the plaintiff at the time he performed the services was the county surveyor of Gage county. From the order of allowance one Burkett, as a taxpayer, appealed to the district court. A trial in that court resulted in a judgment for the plaintiff, and Burkett has brought the case here for review.

The defense in the district court was based on the provisions of section 4469, Ann. St. 1907, which reads as follows: "No county officer shall in any manner, either directly or indirectly, be pecuniarily interested in or r

ceive the benefit of any contracts executed by the county for the furnishing of supplies, or any other purposes; neither shall any county officer furnish any supplies for the county on order of the county board without contract."

Appellant now rests his case, to use his own language, "upon the single question: Is the county surveyor a county officer within the meaning of the section above quoted." Our attention is directed to certain authorities defining the term "county officer," and the case of *Wilson v. Otoe County*, 71 Neb. 435, is cited as requiring a reversal of the judgment of the trial court. That was a case where the plaintiff, who was the county attorney of Otoe county, while holding that office, followed certain litigation from the district court of his county to this court, and where he also prepared and filed a petition for the defendant in an action which it brought in another county, but did not conduct the litigation which followed. His action was brought to recover the reasonable value of his services in the matters above mentioned. The district court sustained a demurrer to his petition, and rendered a judgment for the defendant. This court affirmed that judgment, and, by so much of that decision as was material to that controversy, held that a contract between a county and one of its officers whereby such officer undertakes to perform extra-official services, for which the county undertakes to pay him a compensation in addition to the fees or salary allowed him by law is in violation of the section above quoted, and will not support an action for such extra compensation. We approve of the rule thus announced, and generally of the reasoning contained in that opinion, and it is not our purpose at this time to in any way weaken the force or effect of that decision. It appears, however, that the district court was of opinion that the nature of the plaintiff's office and the services rendered to the defendant were such as did not fall within the inhibition of the statute. In a written opinion filed by the trial court in this case it was said: "If the county desires the services of the county surveyor, it obtains the

same in the same manner as does any private citizen, and pays the compensation fixed by law to all alike. The surveyor is independent of the county. He owes no duty to the county which he does not also owe to every other citizen of the county. He has no part in the management of the county or its affairs. He can aid no other officer of the county in the matter of contracts or official services. He is not one of the cogs in the wheel that turns the affairs of the county. He is simply an official designated by law to do a certain class of work for the public. In name he is a county officer, but in the sense in which the term is used in the section of the statutes above quoted he is not a county officer. His office brings him within the technical letter of the statute, but his official functions leave him clearly without its spirit and purpose. The case of *Wilson v. Otoe County*, 71 Neb. 435, holds any contract between the county and one of its officers whereby such officer undertakes to perform *extra-official* services, for which the county undertakes to pay him compensation in addition to the fees and salary allowed him by law, clearly void. But here the officer contracting with the county receives from the county no fees or salary except as he receives them from every other citizen of the county for similar services performed, and it is clear to my mind that the legislature never intended the prohibition contained in this section should extend to officers situated as the county surveyor is in this action." The foregoing meets with our entire approval. It may be further said that the claim in this case was not for extra-official services performed by the plaintiff as county surveyor, but was for work and labor performed by him as an individual, which had no reference to and was no part of the duties of his office. The work could have been performed by any one possessing the requisite qualifications, and it is quite probable that the reason the county attorney called the plaintiff to his assistance was because of his qualifications, and regardless of the fact that he was at the time the county surveyor. That the county attorney found plaintiff quali-

Shelbley v. Nelson.

fied to assist him in his work was merely a coincidence, and it is quite clear that, if the services had been performed by another not the county surveyor, no question would have been raised as to the county's liability therefor. We are not prepared at this time to hold that the mere fact that plaintiff was the county surveyor prevented him from performing work and labor for the county, which was no part of his official duties, and could have no reference whatever to his official position.

We are of opinion that the facts of this case are not within either the letter or the spirit of the statute; that they are not akin to any mischief which the statute was intended to prevent; that this case should not be ruled by *Wilson v. Otoe County, supra*; that the judgment of the district court was clearly right, and it is therefore

AFFIRMED.

ANNA W. SHEIBLEY, ADMINISTRATRIX, APPELLANT, v.
GEORGE L. NELSON, APPELLEE.

FILED FEBRUARY 20, 1909. No. 15,364.

Abatement: ACTION FOR LIBEL. Under the provisions of sections 455 of the code, a pending action for libel does not abate by the death of the plaintiff.

APPEAL from the district court for Cedar county: AN-
SON A. WELCH, JUDGE. *Motion to revive sustained.*

W. E. Gant, for appellant.

J. J. McCarthy and J. V. Pearson, contra.

LETTON, J.

This is an action for libel. The result of a trial in the district court was a judgment dismissing the plaintiff's action. From this judgment the plaintiff appealed to this court. After the appeal had been duly lodged the plaintiff

Shelbley v. Nelson.

died, and the cause is now pending upon a motion to revive the same in the name of his personal representative. The defendant objects to the revivor, and contends that the cause of action is strictly personal in its nature and does not survive, and that the pending action abated with the death of the plaintiff. The provisions of the code of civil procedure which relate to the subject of survivor and abatement of actions are as follows:

"Section 454. In addition to the causes of action which survive at common law, causes of action for *mesne* profits, or for an injury to real or personal estate, or for any deceit or fraud, shall also survive, and the action may be brought notwithstanding the death of the person entitled or liable to the same.

"Section 455. No action pending in any court shall abate by the death of either or both the parties thereto, except an action for libel, slander, malicious prosecution, assault, or assault and battery, for a nuisance, or against a justice of the peace for misconduct in office; which shall abate by the death of the defendant."

The latter section has heretofore been considered by this court in *Webster v. City of Hastings*, 59 Neb. 563. This was an action for personal injuries occasioned by the negligence of the city. The plaintiff had an action for damages pending at the time of his death. The court said, SULLIVAN, J.: "The section quoted declares, in plain terms, that suits instituted to redress a particular class of wrongs, among them being certain injuries to the person and reputation, shall abate by the death of the defendant, but that no other pending action shall abate for any cause. * * * To sustain the contention of counsel for the city, that the death of a party abates all pending actions except those brought for the vindication of some right covered by the provisions of section 454 of the code, would be to annul completely the provisions of section 455." See, also, *Cleland v. Anderson*, 66 Neb. 252. This section has also been considered by the supreme court of Ohio in the case of *Alpin v. Morton*, 21 Ohio St. 536; t

Shelbley v. Nelson.

having formed a part of the Ohio civil code at that time. The court says: "This section does not enlarge the number of causes of action which survive where no action has been commenced. But if the action is *pending*, for whatever causes, it prevents its abatement by the death of either party, unless it be an action for one of the causes enumerated in the section, and as to them it does not abate, except by the death of the defendant. It seems to have been the purpose of the section to provide that the defendant in no case whatever should gain a case by the death of his adversary, although if the plaintiff's case be one of those enumerated he may be defeated by the death of the defendant." *Baltimore & O. R. Co. v. Joy*, 173 U. S. 226.

Section 463 of the code provides: "Upon the death of the plaintiff in an action, it may be revived in the names of his representatives, to whom his right has passed. Where his right has passed to his personal representative, the revivor shall be in his name; where it has passed to his heirs or devisees, who could support the action if brought anew, the revivor may be in their names."

In *Schmitt & Bro. Co. v. Mahoney*, 60 Neb. 20, it was held that the provisions of this section are applicable to cases pending in the supreme court. Construing these sections together, we think it clear that the pending action did not abate by the death of the plaintiff and that the case should be revived in the name of his administrator. The motion is therefore

SUSTAINED.

IDA M. HIGGINS, APPELLEE, v. SUPREME CASTLE OF THE
HIGHLAND NOBLES, APPELLANT.

FILED FEBRUARY 20, 1909. No. 15,506.

1. **Appeal: PLEADING: OVERRULING MOTION: HARMLESS ERROR.** If the petition in an action upon a policy of insurance or a benefit certificate purports to set out a full copy of the instrument upon which the action is predicated, and the recitals of the copied portion show that the whole contract is not contained in the petition, a motion to require the plaintiff to set forth the whole contract is proper and should be sustained. But where it is shown that the missing portion is in the possession of the defendant, then the rule, "less particularity is required where the facts are within the knowledge of the adverse party," applies, and the error, if any, in overruling the motion is without prejudice.
2. **Pleading: REPLY: AMENDMENT AFTER TRIAL.** In a trial to the court without the intervention of a jury, after all the evidence had been taken and the case submitted, the plaintiff was given leave over objection of defendant to file an amended reply, pleading an additional defense to the new matter in the answer "to conform to the proof." No request was made for further time or to be permitted to introduce further proof. *Held*, That the matter of allowing the amendment was within the discretion of the district court, and that no abuse of this discretion has been shown.
3. **Insurance: PLEA OF FORFEITURE: BURDEN OF PROOF.** The burden of proof is upon the defendant to establish a plea of forfeiture in an action upon an insurance policy or a benefit certificate, and in this case the evidence is examined, and *held* to sustain the judgment of the district court.

APPEAL from the district court for Otoe county: PAUL JESSEN, JUDGE. *Affirmed.*

W. C. Saul and John C. Watson, for appellant.

A. L. Timblin and Roddy & Bischoff, contra.

LETTON, J.

This is an action to recover upon a benefit certificate issued by the defendant to Edgar O. Higgins in favor of the plaintiff, who is the beneficiary named in the certificate

and is the widow of the applicant. The answer pleaded a forfeiture of the right to recover on the certificate by reason of false representations which it alleged were made by the applicant; the representations being that in reply to the question, "Have you ever been rejected for life insurance or benefit?" the applicant answered "No," while the truth was that prior to the date of the application he had been rejected by the Modern Woodmen of America. A reply was filed, denying every allegation in the answer. At the trial a jury was impaneled and sworn, but at the close of plaintiff's testimony the defendant asked for a continuance in order to produce an absent witness, claiming to have been surprised by the evidence offered by the plaintiff. The application was granted by the court and the cause continued. Afterwards it was agreed in open court that a jury be waived, that the jury be discharged, and that the trial proceed to the court. The taking of evidence was completed, and the case was taken under advisement. Later, and before judgment, the plaintiff was given leave to file an amended reply "to conform to the facts already in proof," to which the defendant excepted. An amended reply was filed, pleading that the contract was to be construed under the laws of Iowa, that under the laws of that state a mutual benefit association cannot set up any alleged false answers in the application as a defense to a suit on the certificate unless a true copy of the application is attached to the certificate, and that the defendant failed to attach a true copy. It was further alleged that the applicant truthfully stated all the facts inquired about to the association through its agent, one G. L. Williams, who was the state agent or manager for the state of Nebraska, that the application was written by Williams, who was specially informed of the prior rejection of the applicant by the Modern Woodmen; that, if any false answers were contained in the application, they were made by the defendant or defendant's agents; that the copy of the application attached to the certificate and sent to the assured showed the question as to the assured's

prior rejection to have been correctly answered in the affirmative, and that neither the assured nor the plaintiff had any knowledge that a false answer had been entered in the application until the original application was produced in court by the defendant. A motion was made to strike this reply from the files, which was overruled, and judgment was rendered in favor of the plaintiff for the amount claimed.

1. The first point made by the defendant is that the court erred in overruling the defendant's motion to require the plaintiff to set out a copy of the application referred to in the petition. The petition purports to set forth the certificate *in hæc verba*. The certificate recites: "The application of said member for which this certificate is issued is hereby referred to and made a part hereof." If the petition in an action upon a policy of insurance or benefit certificate purports to set out a full copy of the instrument upon which the action is predicated, and the recitals of the copied portion show that the whole contract is not contained in the petition, a motion to require the plaintiff to set forth the whole contract is proper and should be sustained. But where, as in this case, it is shown that the missing portion is in the possession of the defendant, and that it is upon matter contained in the missing portion that the defendant relies as constituting a defense, then the rule "less particularity is required where the facts are within the knowledge of the adverse party," applies, and the error, if any, in overruling the motion is without prejudice.

2. The next point made is that the court erred in granting leave to the plaintiff to file an amended reply after the case had been submitted. It is contended that the amended reply changed the issues, and that it introduced a new cause of action which should have been set forth in the petition. We cannot agree with this contention. The petition pleaded the issuance of the certificate and the death of the assured. The answer admits the issuance of the certificate, but pleads a forfeiture by reason of a false

answer to a certain question. The original reply was a general denial. As a part of her evidence in chief, the plaintiff offered certain sections of the statutes of Iowa, to which the defendant objected as incompetent, irrelevant and immaterial, and not the best evidence, which objection was overruled. These sections contained the provisions referring to the duty to attach a copy of the application to the certificate, and providing that, if an association neglects to comply with this requirement, it shall not be permitted to plead or prove the falsity of any such representation in an action on the certificate. As the pleading then stood, this evidence was immaterial, and the amendment was necessary to bring it within the issues. The amendment as to the Iowa law was a matter of defense to the alleged forfeiture, and was not a proper part of the petition. The allowance of the amendment was within the discretion of the court, and no abuse is shown. At the time the amendment was made, if the defendant had been surprised or anywise prejudiced by its allowance, it might have requested the court to continue the case and to permit it to introduce further proof, but it did not so request. The trial was to the court, and it would have been easy to comply with such a request if it had been made. We cannot see that the defendant was prejudiced by the filing of the amended reply.

But, even if the pleading of the Iowa statute and all the evidence on this point had been omitted from the case, we think the judgment of the district court upon the main defense of false representations is fully justified. The evidence showed that the application was taken by one Williams, who was the manager of the association for the state of Nebraska, and that the application, with the exception of the signature and that portion in the handwriting of the examining physician, was written by him. The plaintiff swears that she was present during a portion of the time that Mr. Williams was preparing the application, and that she heard him ask her husband the question, "Have you ever been rejected for life insurance

or benefit?" and that her husband answered "Yes." She further testifies that her husband told Williams he had been rejected by the Modern Woodmen, and he thought that would prevent him from getting into any other order; that "Mr. Williams told him that wouldn't make any difference in that order, and he says, 'Where that answer is,' to that question in there, 'that isn't necessary and it don't have to be answered by you.'" The evidence shows that this application was sent to the head office in Iowa, that a copy of it was made and attached to the benefit certificate, and that the certificate was delivered to the assured by Williams personally. This copy is all in the handwriting of the clerk who made it, except that in the blank after the answer to the question referred to the word "Yes" is written, instead of the word "No," as appears in the original application. This portion of the copy bears traces of erasure and alteration, and from its appearance it would seem that whatever word, if any, had been originally written in the blank had been obliterated, and the word "Yes" written in, at first lightly, and afterwards in a heavier hand and with blacker ink. Mrs. Higgins testifies it is now in exactly the same condition as it was when delivered to them by Williams. The clerk of the local Modern Woodmen camp, who was a witness called by the defendant, testifies that in a conversation he had with Mr. Higgins in relation to his rejection by the Modern Woodmen Higgins said: "That it didn't make much difference anyway; that he was going into the Highland Nobles anyway. * * * He said he had told them he had been rejected, but it didn't seem to make any difference to them." The evidence of Mrs. Higgins was uncontradicted and unimpeached. In this condition of the evidence, we have on one side the original application in Williams' handwriting signed by Higgins, which shows the word "No" when the copy shows "Yes." On the other we have the testimony of Mrs. Higgins that Williams was distinctly informed that her husband had been examined and rejected by the Modern Woodmen, the testimony of a

witness for defendant that Higgins said he had informed the Highland Nobles of this fact, and the further circumstance of the alteration in the copy of the application which was delivered to the assured, and which, the testimony seems to indicate, was made by Williams after he received the copy, and before he delivered it to the assured. Williams was not upon the witness stand, and there is nothing to show why he was not called.

The burden of proof was upon the defendant to show that the answer was made by the applicant as written in the application; that it was false in some particular material to the risk; that it was intentionally made by the assured; and that the insurer relied and acted upon the statement. *Kettenbach v. Omaha Life Ass'n*, 49 Neb. 842. It has been repeatedly declared by this court that a forfeiture will not be declared in an action upon an insurance policy because of misstatements in a written application where it appears that the application was written by the agent of the insurer, and that the facts were truthfully stated by the applicant. *German Ins. Co. v. Frederick*, 57 Neb. 540; *Home Fire Ins. Co. v. Fallon*, 45 Neb. 554; *Fidelity Mutual Fire Ins. Co. v. Lowe*, 4 Neb. (Unof.) 159. In the latter case it appeared that certain answers to questions in the application were misstatements of fact. The application was written out by the agent upon statements made by the plaintiffs, who testified that the answers had been truthfully made while the agent testified that they were made as written in the application. The application was signed by the applicant and delivered to the agent, who transmitted the same to the company. The trial court instructed the jury that, if the facts with reference to the total incumbrances, were correctly stated to the agent, and the statements in the application were written by the agent after this communication was made to him, the policy would not be void. This instruction was upheld by this court in an opinion by Mr. Commissioner KIRKPATRICK, which examines and reviews many authori-

Keeling v. Pommer.

ties upon the point from this and other states. 1 Bacon, Benefit Societies and Life Insurance (3d ed), sec. 153.

We think that the evidence upon this point alone fully justifies the judgment of the district court, and it is therefore

AFFIRMED.

MARY S. KEELING, APPELLEE, v. PETER POMMER ET AL.,
APPELLANTS.

FILED FEBRUARY 20, 1909. No. 15,543.

1. Trial: VERDICT. A jury brought in a sealed verdict, which, upon being opened, was found to be defective in form. On the direction of the court, they again retired to the jury room and returned a verdict in the same amount and against the same parties as before, but in proper form. *Held*, That the failure to receive the first verdict and the receiving of the second was not erroneous.
2. Intoxicating Liquors: DAMAGES. In an action brought by a wife to recover damages under the statute governing the sale of intoxicating liquors where the husband died as a result of the traffic, loss of means of support is not the only damage for which a recovery may be had, but the wife may recover the cost of the necessary medical attendance paid by her and funeral expenses necessarily incurred by her in procuring the burial of her husband, when such items of damage are alleged and proved.

APPEAL from the district court for Lancaster county:
LINCOLN FROST, JUDGE. *Affirmed.*

Strode & Strode, for appellants.

J. C. McNerney, R. D. Stearns and Rose & Comstock,
contra.

LETTON, J.

This is an action brought by Mary Keeling for herself and her minor child to recover damages for loss of support and for expenses incurred by her for medical attendance

Keeling v. Pommer.

and funeral charges occasioned by the death of her husband, which she alleges was caused by the excessive use of intoxicating liquors sold to him by the defendants Peter Pommer and Levi D. Munson. The action is against the liquor dealers and the sureties upon their respective bonds. The jury found in favor of the defendant Levi D. Munson, and against the defendant Pommer and his surety. The proof shows that Alfred M. Keeling, the husband of plaintiff, was in his lifetime a painter and paper-hanger by trade, earning about \$75 a month; that he had been a user of intoxicating liquor for some time, but that between April 16, 1905, and the time of his death in June, 1905, he became addicted to the excessive use of such liquors to such an extent as to aggravate and intensify the ravages of the disease from which he was suffering, to break down his recuperative powers and to eventually cause his death, which, the testimony shows, was caused from alcoholic cirrhosis of the liver. The jury returned a verdict for \$1,200 in favor of the plaintiff, but she was required to remit \$75 of the amount, and judgment was returned for \$1,125. It appears that the case had been submitted to the jury in the evening, with the direction that they might return a sealed verdict if they agreed in the nighttime. The jury agreed and returned into court next morning with a sealed verdict, finding against Pommer and his surety for "one thousand dollars damage and two hundred funeral expenses." The court, after reading the verdict, returned it to the jury, instructing them that it was not in proper form; that they should again retire, and that whatever amounts they should find against the defendant should be added together and the aggregate sum only given in the verdict. The defendants waived the giving of this instruction orally, but objected "to sending the jury out again to return another and different verdict than the one already returned by the jury," and asked that the verdict be received and the jury be discharged. The jury retired, and afterwards came into court with their verdict, finding for the plaintiff in the sum of \$1,200.

1. The first point made by the defendants is that the court erred in refusing to receive the first verdict and in receiving the second. We think there was no error in this. It is the duty of the court to see that its proceedings are conducted in a proper and orderly manner, and, if through some oversight or mistake, a verdict is not in proper form when it is brought into court, it is incumbent upon the court in the proper discharge of its duties to see that the jury render a verdict correct in form. The defendants were in nowise prejudiced by this action of the court. The form of the verdict alone was changed, and not its substance. *Rogers v. Sample*, 28 Neb. 141.

2. The next point made is that the verdict includes \$200 for funeral expenses, that funeral expenses do not constitute a proper element of damages to be considered by the jury, and that the court erred in receiving evidence of such expenses. It is also argued that, if these charges are allowable at all in this class of actions, they should be set forth as a separate cause of action from the damages alleged to have been sustained for loss of means of support. The petition pleads specially that the plaintiff incurred expenses for medicine and for doctors' attendance during her husband's last illness, and for funeral charges after his death to the amount of \$200. Even if these constitute a separate cause of action, it does not appear that any motion was ever made to require plaintiff to separately state and number her causes of action, and it is too late now to make this objection.

The question whether evidence of these expenses should have been admitted and whether they constitute proper elements of damage is more serious. Under a statute of Wisconsin, which gives a right of action to a wife who has been injured in person or property or means of support in consequence of intoxication, and a right to recover the damages sustained from the party causing the intoxication, it was held, where the husband's intoxication made him unable to attend to his business, and his wife had to employ another man to do his work, and to hire men to

aid her in taking care of him, and was obliged to employ and pay a physician for medical attendance upon him, that all these expenses were valid claims against the defendant. *Wightman v. Devere*, 33 Wis. 570. To the same effect are *Thomas v. Dansby*, 74 Mich. 398; *Coleman v. People*, 78 Ill. App. 210; *Horn v. Smith*, 77 Ill. 381. The statutes of this state provide that a married woman may maintain a suit for all damages sustained by herself and children on account of such traffic. The language is broad and sweeping in its provisions. It is said by defendants that in *Gran v. Houston*, 45 Neb. 813, this language is used by this court, speaking of the Slocumb law (ch. 50, Comp. St. 1889): "The action accorded by this act for the death caused by intoxication is not an action proper for the death, but for the loss of means of support resulting from the death." In that case, however, the petition counted solely upon loss of support, and the question whether other expenses necessarily incurred were recoverable was not involved. In the case of *Murphy v. Willow Springs Brewing Co.*, 81 Neb. 223, this case with others in this court on the same subject were examined, and it was held that loss of means of support is not the only damage for which a recovery may be had in such an action. We are fully satisfied that, under the statutory provision that a married woman may recover "all damages sustained by herself and children on account of such traffic," the reasonable expenses of medicine and medical attendance are proper elements of damage, and we see no reason why funeral expenses should not follow in the same category if the wife is compelled to pay them by the necessities of the situation. It appears that the widow was obliged to pay these expenses from her own resources. The evidence shows that she requested the undertaker to make the expenses as low as possible. It was as necessary for her to give her husband's body decent burial as it was to provide him with medical attendance, and, there apparently being no estate, she was justified in paying the charge. What-

ever sums she paid for medical attendance or for funeral expenses were necessarily taken from her meager store. We presume that the idea of the trial judge in requiring the remittitur of \$75 was to bring the amount of the recovery strictly within what the proof showed.

3. Complaint is made of the refusal to give certain instructions requested by the defendant Munson. Since the other defendants did not join in the request for such instructions, they were not prejudiced by their refusal. If they had desired such instructions given to the jury, they should have requested them.

4. It appeared that beer had been prescribed by the attending physician during the last sickness, and that the plaintiff had received and receipted for the beer and permitted her husband to drink the same. An instruction was requested by the appellants that such sale and delivery would not make them liable for damages resulting to the plaintiff under the pleadings in this case. The refusal of this instruction is complained of. We think the instruction is misleading in its nature, and that, if it had been given and a judgment for the defendants had resulted, it would have been prejudicially erroneous as against the plaintiff. If the evidence on behalf of the plaintiff had been confined to the sale and delivery of beer prescribed by the physician the instruction might have been applicable; but this was not the case. The evidence showed other sales by the defendant, Pommer, during the time alleged in the petition, and the defendants' theory as to this defense was submitted to the jury in an instruction given on the court's own motion. There was no error in the refusal of this instruction. One or two other errors are assigned, but none of any importance.

In the whole record we find no prejudicial error, and the judgment of the district court is

AFFIRMED.

JAMES SEGEAR, APPELLANT, v. GEORGE WESTCOTT, APPELLEE.

FILED FEBRUARY 20, 1909. No. 15,564.

1. **Appeal: PLEADING: AMENDMENT.** If the identity of the cause of action or ground of defense is preserved, a petition or answer may be amended on appeal to the district court.
2. ———: **TAKING CASE FROM JURY: WAIVER.** At the close of the evidence each party requested a directed verdict in his favor, and neither party requested a submission of the case to the jury. The court thereupon dismissed the jury and decided the case upon the law and the evidence. *Held*, That plaintiff cannot complain upon appeal of this action by the trial court.

APPEAL from the district court for Douglas county:
WILLIS G. SEARS, JUDGE. *Affirmed.*

J. W. Eller, for appellant.

Lambert & Winters, contra.

LETTON, J.

The facts in this case were stated in a former opinion, 77 Neb. 550. The provisions of the lease under which the plaintiff held possession of the land gave the lessor the right to dispose of a portion of the premises. Defendant's contention is that under this provision a street had been opened by the city over the land, which street he used during the time for which the plaintiff alleges he is indebted to him under an agreement to pay a monthly rent for the use of a private way over plaintiff's premises. At the second trial, after both parties had introduced their evidence and rested, the plaintiff moved the court to instruct the jury in his favor for the amount claimed, and the defendant moved the court to instruct the jury for the defendant. These motions were submitted together, whereupon the court upon its own motion discharged the jury and held the case for argument and further disposition, to which discharge and disposition of the case each party objected

and excepted, but neither requested that the case be submitted to the jury under instructions. The case was then argued and submitted to the court, which took the same under advisement, and afterwards during the term found generally for the defendant and rendered a judgment dismissing the case, from which judgment the plaintiff has appealed.

An amended answer was filed in the district court, which, the plaintiff claims, changed the issues from those tried in the county court, and at the first trial in the district court. We think that there is no merit in this contention. While the exact language is not used in both answers, the identity of the defense is preserved. The plaintiff claimed the right of recovery for the use of a private way across his premises to the Missouri river. The defendant admitted the use of the private way for a certain period, alleged payment therefor, and claimed that a public way was created across the premises to the river which he used thereafter, and that he was not indebted to the defendant for such time as he used the public way. The matter in controversy was the same and the defense was substantially identical with that alleged in the county court. This is all that is necessary. *Myers v. Moore*, 78 Neb. 448; *North & Co. v. Angelo*, 75 Neb. 381.

It is next contended that the court erred in dismissing the jury and rendering judgment. We think that the mere fact that the court discharged the jury and thereupon rendered a judgment under the circumstances in this case is of no great moment. It was irregular, but not prejudicial. Where a verdict is directed by the court, the action of the jury is ministerial in its nature. The rendition of the verdict is at most a mere form, for, if the jury should return a verdict contrary to the direction, it would be the duty of the court to immediately set the same aside. The result in this case is no different than it would have been had the court directed the jury to return a verdict for the defendant. The general rule is that, where at the conclusion of a trial both parties request a directed verdict, they

thereby, in effect, waive the jury and consent that the case may be determined by the court. The reason for the rule is clearly stated by Sanborn, J., in *Phenix Ins. Co. v. Kerr*, 129 Fed. 723, as follows: "Where each of the parties to a trial by jury requests the court to charge them to return a verdict in his favor, he waives his right to any finding or trial of the issues by the jury, and consents that the court shall find the facts and declare the law. An acceptance of these waivers and a peremptory instruction by the court in favor of either party constitutes a general finding by the court of every material issue of fact and of law in favor of the successful party. The case is then in the same situation in which it would have been if both parties had filed a written waiver of a jury and it had been tried by the court. Each party is estopped by his request from reviewing every issue of fact upon which there is any substantial conflict in the evidence, and the only questions which the instruction presents to an appellate court are, was the court's finding of facts without substantial evidence to sustain it? And was there error in its declaration or application of the law?" *United States v. Bishop*, 125 Fed. 181; *Bowen v. Chase*, 98 U. S. 254; *Beuttell v. Magone*, 157 U. S. 154; *Laing v. Rigney*, 160 U. S. 531; *Chrystie v. Foster*, 61 Fed. 551; *Stanford v. McGill*, 6 N. Dak. 536; *Provost v. McEncroe*, 102 N. Y. 650; *Sturm-dorf v. Saunders*, 102 N. Y. Supp. 1042; *Aber v. Twitchell*, 116 N. W. (N. Dak.) 95; *Larson v. Calder*, 16 N. Dak. 248. We cannot add to the lucidity of this exposition. There was no error in the proceedings of the court in this regard.

The only remaining question is whether there is sufficient evidence to sustain the finding of the court. The evidence is conflicting in its nature, and it is difficult to determine from the description given by the witnesses whether or not the road to the dumping ground used by the defendant after the public way was opened was confined to the dedicated strip. We are satisfied, however, that there is sufficient evidence in the record to uphold

State v. Chicago & Northwestern R. Co.

the findings of the district court; his findings in a law case being entitled to the same weight and conclusiveness as the verdict of a jury.

The judgment of the district court is

AFFIRMED.

STATE, EX REL. FRANK DOBNEY, APPELLEE, v. CHICAGO & NORTHWESTERN RAILWAY COMPANY, APPELLANT.

FILED FEBRUARY 20, 1909. No. 15,469.

1. **Carriers: DISCRIMINATION.** A railway company so distributed its freight cars that empty cars were ordinarily retained on the division where they had been unloaded until they could be reloaded with outgoing freight. It also preferred shippers of live stock, grain and all kinds of merchandise over the shippers of hay located at noncompetitive points on its railway, and, during a hay blockade at its terminals in Chicago and Omaha, withheld cars for the shipment of hay to other points until the congestion at said terminals was relieved. *Held* an unlawful discrimination against the shippers of hay.
2. ———: **SHORTAGE OF FACILITIES: RIGHTS OF SHIPPERS.** L. applied to the district court for, and secured, a peremptory writ of mandamus, which directed the railway company to furnish 50 cars, at the rate of at least 5 cars a day for his use. There was a general shortage of cars and locomotives available for the use of the patrons of the carrier, but the railway company had exercised diligence to provide adequate equipment for the transaction of its business. *Held*, That L. was only entitled to a just division of the empty cars that should have been apportioned by defendant to the station where L. was engaged in business.
3. **Costs.** Although the order of the district court should be reversed, yet, as defendant was in fault to some degree, and it had exclusive possession of the facts which would instruct plaintiff concerning the form of his demand and the limit of his rights, the court in the exercise of its discretion will tax the costs of the proceeding to the carrier.

APPEAL from the district court for Holt county: WILLIAM H. WESTOVER, JUDGE. *Reversed.*

B. T. White, C. C. Wright and B. H. Dunham, for appellant.

M. F. Harrington, contra.

Root, J.

Appeal from a judgment of the district court for Holt county peremptorily ordering defendant to furnish empty cars for the use of plaintiff in shipping hay.

1. Defendant argues that the district court did not have jurisdiction to entertain the application of plaintiff, nor to issue a writ to compel defendant to furnish cars, for the reason that the state railway commission, by virtue of sections 10649 *et seq.*, Ann. St., 1907, has exclusive original jurisdiction in the premises. The point has been considered and determined adversely to defendant in *State v. Chicago & N. W. R. Co.*, p. 524, *post*.

2. It is most strenuously argued that to permit the district courts to issue writs in cases like the one at bar will substitute the judgment of courts for that of the managers of railways in the control of the business affairs of the carriers and cause inextricable confusion, to the great detriment not only of the railway company, but the public as well. There is much force in the argument, and, but for our understanding that defendant has discriminated against the shippers of hay in a very considerable section of the state, we would not sustain the district court in any particular. The respondent made a very complete, and, we believe, truthful disclosure of its resources and methods of providing shippers with cars.

It appears that respondent operates 9,000 miles of railway situated in many different states, but forming a connected system. Fifteen hundred miles of said railway are west of the Missouri river. Defendant owns 51,000 box cars and 1,425 locomotives. In five years next preceding the institution of this suit defendant steadily and largely increased the number and capacity of its cars and locomotives. Conditions have been such that from twelve to

eighteen months would intervene between the placing of orders for equipment and the delivery thereof, because of the congested condition of business and the inability of the manufacturers to meet the demands of trade. In the year preceding the hearing respondent had increased its tractive power 26 per cent., and its business for that time had developed 23 per cent. The locomotives and cars of respondent are distributed among the various operating divisions into which its railway is divided, and the apportionment is under the supervision of one man located in Chicago. It is the policy of defendant, as far as practical, to so control traffic that cars unloaded at any particular station or the stations comprising any division are retained at such points or on that division, to be reloaded with merchandise or other property, to be shipped out of that territory, and thereby obviate the movement of empty cars. Defendant's railway west of the Missouri river traverses territory that may, for the purposes of traffic, be separated into divisions of distinct character. The stations on the branches south of the Platte, on the Bonesteel line, and from Norfolk east to the Missouri river, export principally grain, flour, dairy products and live stock. Most of this territory is well settled, and the incoming freight during part of each year fills nearly enough cars to move the outward bound cargoes. From a point some distance west of Norfolk to Long Pine the principal exports are hay and live stock. West of Long Pine great quantities of potatoes are grown and shipped. From the stations further west many range cattle are transported. The country surrounding Stuart, where relator resides, and for a considerable distance in all directions, especially westward, along defendant's railway, is devoted principally to the production of hay. This territory is rather sparsely settled, and the incoming loaded cars furnish but a fraction of those necessary to transport the hay shipped therefrom. No other railway has been constructed near enough to Stuart to compete with respondent, and its monopoly in the matter of transporting the products of that

territory to market is fixed and absolute. About the middle of September the shipment of range cattle commences, and from that date till the early days of November respondent enjoys a remarkable business of that character, aggregating sometimes 600 cars a week. This traffic is largely interstate. To accommodate this business not only cars, but locomotives are sent from defendant's various divisions to the cattle country, with a consequent diminution of facilities for the movement of other freight during that time.

Defendant receives more for the transportation of merchandise, live stock and grain than for the carriage of hay. Because of the bulky character of hay, even when compressed into bales for shipment, it cannot be either loaded or unloaded as expeditiously as the cereals; nor is provision made for its storage in quantities, as in the case of coal, but the supply in any market is augmented continuously, and the demand therefor responds with celerity to any marked increase in the use thereof. Hay, when shipped, is unloaded from the railway team tracks and distributed generally with but little delay to the consumer. Whenever the demand for this article slackens in the cities the team tracks of the various terminals will become congested, and loaded cars devoted to the shipment of hay will remain idle for some time. With this knowledge, defendant has gauged its conduct toward shippers in the hay districts in Nebraska with reference to conditions existing in its Omaha and Chicago terminals, so that, whenever its hay tracks in those cities are filled with loaded cars, it assumes that the same facts exist at all other points where hay might be shipped or consumed, and places an embargo on the traffic, which is not raised until the accumulation of hay in Omaha or Chicago has been greatly reduced. Therefore if a patron desires to ship to markets other than said cities, even though there is an active demand for his product, it is extremely difficult to secure cars for his purpose while said embargo is in force. It also appears that respondent when pressed for cars

gives preference to shippers of merchandise, grain and all kinds of live stock over the dealers in hay. It also appears that from the 1st to the 16th days of October, 1907, both inclusive, there were requests at stations on defendant's Lincoln line for 565 empty freight cars; there were at said stations 264 empty cars and 227 in the process of unloading. During the same time at the stations upon the Superior line 366 cars were demanded; there were 480 empties and 316 were being unloaded. At stations on the Bonesteel line upon said days patrons asked for 906 empty cars; there were 329 empty cars on hand and 439 were being unloaded. At the stations from Norfolk Junction to Long Pine there were calls during said time for 1,739 empty cars; 363 were furnished and 329 were being unloaded. The foregoing figures are the aggregate of daily reports, so that the cars that were reported one day as being unloaded would probably be included in some succeeding day's report of empty cars. It will therefore be noticed that but 35 more empty cars were furnished in 16 days to all of the 20 stations in the 133 miles of road from Norfolk Junction to Long Pine, which includes Stuart, than were unloaded on that division during that time, and that there was a shortage of over 1,300 freight cars at said stations in those 16 days. During that period there was an excess of 120 empties on the Superior line. It is further shown that there has been a shortage of cars for the shipment of hay in September and October in 1904, 1905 and 1906, with like results.

The record fairly warrants a deduction that defendant has employed reasonable diligence to supply itself with equipment to transact its business; that because of the lack of competition it has a monopoly of railway transportation from Stuart and several other like stations in the "hay belt" on its line of railway; that it is more profitable for respondent to have the traffic in hay distributed throughout the year, so that cars used for that purpose may be supplied from freight cars loaded with articles that are shipped into the "hay belt"; that preference is

given shippers of live stock, grain and merchandise over those offering hay for transportation; that in case of a hay blockade on the team tracks in Chicago and Omaha empty cars are withheld and are not supplied to Nebraska hay shippers, without regard to the destination of their consignments; that in case of extreme demand for motive power and empty cars during the range cattle shipping season the "hay belt" is discriminated against as compared with other territory tributary to defendant's railway; that this discrimination is induced by the determination of respondent to handle all of the traffic it can control with the greatest economy in the management of its business and resulting profit to itself; that defendant could have distributed the empty cars under its control in Nebraska in October, 1907, so as to have given relator some relief, and without in any manner interfering with interstate traffic. On the other hand, relator first requested the use of three cars a day, and then, as a foundation for this action, increased his demand to five cars a day until 50 cars were thus supplied, and the order of the trial court is that cars be ordered in that manner. Relator was not entitled, under the circumstances, to all of the relief he demanded. He should have received a just division of the cars that ought to have been apportioned to the station of Stuart, and that number should have been greater than was furnished by defendant. The time has long since passed within which defendant was to comply with the order of the district court, and to affirm the judgment now will not impel the performance of any duty. As defendant was somewhat in fault, and the facts were all in its possession, and but few of them known to plaintiff, it should pay the costs of this case in any event. *State v. Chicago, B. & Q. R. Co.*, 71 Neb. 593; code, sec. 675d.

The judgment of the district court, therefore, is reversed, but a judgment will be entered taxing all of the costs in this court and in the district court to the defendant.

REVERSED.

STATE, EX REL. WILLIAM LUBEN, APPELLEE, v. CHICAGO &
NORTHWESTERN RAILWAY COMPANY, APPELLANT.

FILED FEBRUARY 20, 1909. No. 15,472.

1. **Carriers: REFUSAL TO FURNISH CARS: REMEDY.** Chapter 90, laws 1907, will not in every instance afford a shipper an adequate remedy against a railway company that unlawfully neglects and refuses to furnish cars for the transportation of his goods and chattels.
2. **Mandamus: CARRIERS: REFUSAL TO FURNISH CARS.** In an action in mandamus to compel a railway company to furnish cars for a shipper, the proof established that the relator desired to ship his hay in car-load lots; that he had repeatedly requested the carrier to furnish him cars for said purpose, and that it had failed to do so. No reasonable excuse was shown for such conduct. *Held*, That a peremptory writ of mandamus in favor of the shipper and against said corporation was proper. .

APPEAL from the district court for Holt county: WILLIAM H. WESTOVER, JUDGE. *Affirmed*.

B. T. White, C. C. Wright and B. H. Dunham, for appellant.

M. F. Harrington, contra.

ROOT, J.

William Luben applied to the district court for Holt county for a peremptory writ of mandamus to compel defendant to furnish him at Emmet, a station in said county on defendant's railway, 5 cars for the shipment of hay, and thereafter 41 additional cars at the rate of 1 car a day, Sundays excepted. An alternative writ was issued. In its return defendant challenged the jurisdiction of the court over the subject matter of the action; alleged that there was an unusual demand for freight cars to market perishable products; that it had assigned a fair proportion of its available cars for the hay trade, and is willing to allow relator his just proportion of the cars allotted to

Emmet, and that to do more will discriminate in plaintiff's favor and against defendant's other patrons; that to supply all cars demanded of it for the transportation of hay would congest and glut its terminal facilities and the market, and hinder and delay the movement of freight. The court, after hearing the evidence, issued a peremptory writ. The evidence discloses that plaintiff possessed sufficient hay to fill the cars referred to in the alternative and peremptory writs. Defendant did not introduce evidence to sustain the allegations in its return. The writ, therefore, was properly allowed, unless, as argued by defendant, the railway commission law enacted by the legislature in 1907 has deprived the district courts of jurisdiction to order a carrier to furnish cars to a shipper.

The statute (section 10649 *et seq.*, Ann. St., 1907) purports to vest said commission with "power to regulate the rates and service of, and to exercise the general control over all railroads, express companies * * * and any other common carrier engaged in the transportation of freight or passengers within the state." Section 10650. Section 10658 provides that a complaint may be made to said commission concerning any default of a carrier, whereupon a notice shall be given the latter, a hearing had, and then the commission may enter such an order as may be just and reasonable, and a copy thereof shall be served on the railway company, to become effectual within ten days thereafter, unless a later date shall be named in the order. If the carrier refuses to comply, the commission, or any person interested, may apply to the district court for the enforcement by summary proceedings of said order, and an appeal may be taken from the district to the supreme court. The statute does not purport to vest the commission with exclusive jurisdiction.

Independent of the commission law or any other special statute, it was defendant's duty to furnish reasonably adequate provisions for the transportation of freight offered it for shipment over its railway, and to serve its patrons without discrimination. *State v. Chicago, B. & Q. R. Co.*,

71 Neb. 593. And the courts will compel by mandamus the discharge of that duty in a proper case. *State v. Chicago, B. & Q. R. Co.*, *supra*. Any other remedy is not adequate, unless it will furnish the aggrieved party relief upon the very subject matter of his application. *State v. Stearns*, 11 Neb. 104; *Hopkins v. State*, 64 Neb. 10; *Fremont v. Crippen*, 10 Cal. 211; *Babcock v. Goodrich*, 47 Cal. 488. In cases like the one at bar proceedings before the commission will not afford that relief. The order, if made by the commission, is simply a step incident to an action in the district court, which may be anticipated and restrained by the carrier for an indefinite time by an action in a court distant from the residence of the complainant. *State v. Chicago, St. P., M. & O. R. Co.*, 19 Neb. 476, has not been overlooked. That case involved an application of the first railway commission statute, and related to a controversy between individuals and a railway company concerning the location of an additional station. There was reasonable ground for difference of opinion as to whether another station was necessary, and the subject was a proper one for the commission to investigate. There is no room for argument that a shipper is entitled to receive cars without discrimination. The delay of a few months or several years in the construction of an additional railway station will not work any great hardship, but the very business existence of the shipper is staked upon the use of facilities for the transportation of his product or merchandise, and he is entitled to a hearing upon this point in a forum that has power to make its orders effective. The question of jurisdiction is therefore resolved against respondent.

The judgment of the district court is therefore

AFFIRMED.

NERIAH B. KENDALL, TRUSTEE, APPELLANT, v. THOMAS
ULAND ET AL., APPELLEES.

FILED FEBRUARY 20, 1909. No. 15,532.

1. **Forcible Entry and Detainer: SUPERSEDEAS BOND: LIABILITY.** In an action upon a supersedeas bond given in justice court to stay a writ of restitution in forcible entry and detainer proceedings, plaintiff is not entitled to recover according to the terms of a lease for the same premises between said parties for the year preceding the unlawful detention, but only a reasonable rent for said period.
2. ———: **ACTION ON BOND: EVIDENCE.** Proof of the tenant's reasons for refusing to yield possession of said premises is not relevant in such an action, and allegations with reference thereto will upon defendant's motion be stricken from the petition.
3. ———: ———: ———: **PLEADING.** In such an action a lease between the parties for the year next preceding the unlawful detention is relevant evidence on behalf of the plaintiff, although it provides for rent in kind, and he may also prove the value of the crops received by him thereunder, but allegations in the petition concerning such facts may be stricken therefrom as an attempt to plead evidence.

APPEAL from the district court for Lancaster county:
ALBERT J. CORNISH, JUDGE. *Reversed.*

Charles O. Whedon and J. A. Brown, for appellant.

Halleck F. Rose, W. B. Comstock and A. L. Chase, contra.

ROOT, J.

Action upon a supersedeas bond given in justice court on appeal from an order of restitution, and also upon a bond for waste given in the district court on appeal to this court from a judgment affirming the aforesaid judgment in justice court. The tenant paid plaintiff \$550, which he averred was in excess of the rental value of said premises for one year. Judgment for defendants, and plaintiff appeals.

1. In the original petition plaintiff alleged that the tenant defendant had unlawfully, forcibly, and with intent to defraud refused to surrender possession of the demised premises at the expiration of a written lease which terminated in February, 1905; that said lease was for one-half of the crops grown upon the farm; that the value of the landlord's share of the 1904 crop amounted to over \$1,200, and the fair value of one-half of the crops grown on said land in 1905 was \$1,325; that there were many opportunities to rent said farm for 1905, and but for the acts of defendants plaintiff would have rented it for said season for one-half the crops grown thereon. A copy of the bond is set out in the petition, and a claim made thereon for the alleged rental value of the premises, to-wit, \$1,325, less the credit aforesaid. The cause of action upon the waste bond does not seem to be seriously contended for, and will not be given further notice. The court on defendants' motion struck from the petition the allegations relating to renting upon shares and concerning the alleged fraudulent conduct of the principal in the bond, and compelled plaintiff to file an amended petition omitting those statements. The condition in the bond is in the language of the statute that the principal therein "will satisfy the final judgment and costs and will pay a reasonable rent for the premises during the time he shall unlawfully withhold the same." The tenant's motives in unlawfully refusing to yield possession of the demised premises will neither excuse his conduct nor increase the landlord's recovery on a bond like the one in suit. The averment that the landlord had an opportunity to rent the land for a share of the crop in 1905 is immaterial, and the allegations concerning the value of the crops received as rent in 1904 are, at the most, statements of evidence, and were improperly included in the petition.

2. Upon the trial the court excluded the lease between the parties for 1904, and refused to permit plaintiff to show the amount of crops grown on the farm in said year, or the prices obtained therefor, or that plaintiff had ordi-

narily leased the land for share rent, and confined the proof on the subject of damages to a description of the farm, the improvements thereon and qualities of the soil, supplemented by opinions of witnesses concerning the fair cash rental value of the land during the period defendants unlawfully detained possession thereof, and instructed the jury that by "reasonable rental value is meant the reasonable rental value in cash of the land occupied, estimated as of the time when the bond sued upon was given, to wit, February 15, 1905." Plaintiff asserts that defendants should be held to the same liability as a tenant holding over, and that the terms of the 1904 lease will control the instant case; otherwise the tenant will be given the benefit of his own wrong. Plaintiff at all times subsequent to February, 1905, has refused to recognize his former tenant in any other capacity than a wrongdoer, and he cannot recover from him as a tenant holding over. *Rosenberg v. Sprecher*, 74 Neb. 176. The defendants, however, are liable upon their undertaking, and that is to "pay a reasonable rent for the premises during the time he shall unlawfully withhold the same." Now, rent is a certain profit issuing yearly out of lands and tenements corporeal as a compensation for the use thereof. *State v. McBride*, 5 Neb. 102. It may be paid in money, services, or in products of the soil. 1 Woodfall, Landlord and Tenant, p. *438; *Whithed v. St. Anthony & Dakota Elevator Co.*, 9 N. Dak. 224, 81 Am. St. Rep. 562. And in the case at bar plaintiff, as near as possible, should be indemnified for the tenant's wrongful conduct, but the inquiry must be confined to the value of the term enjoyed by him at plaintiff's expense. Testimony of experts as to the fair rental value of the land is helpful, but it is not the only relevant evidence. It is generally held that, if conditions continue unchanged, a lease for a fixed rental between the parties for an antecedent year for the same land is competent evidence. *Vincent v. Defield*, 105 Mich. 315; *Fogg v. Hill*, 21 Me. 529. And any other evidence concerning the pecuniary advan-

First State Bank of Pleasant Dale v. Borchers.

tage to be derived from the use of the land during the disputed term would have some bearing as to what one would be likely to pay therefor. *Baldwin v. Skeels*, 51 Vt. 121. Although the lease did not provide for a cash payment or the delivery of any certain number of bushels of grain, it was relevant as tending to shed some light on the controversy, and should have been received in evidence. The testimony offered to prove the value of the rent share of the crop received by plaintiff for 1904 was also competent. *Shutt v. Lockner*, 77 Neb. 397. We do not wish to be understood as holding that the terms of said lease or the value of the crop received for 1904 would control the verdict, but those facts should have gone to the jury to be considered in connection with the other evidence to establish "a reasonable rent for the premises during the time he" (the tenant) unlawfully withheld the same.

3. There are some other errors assigned, but we conclude that upon a second trial of this case the parties will not have just cause for complaint, and they will not be further noticed.

The judgment of the district court, therefore, is reversed and the cause remanded.

REVERSED.

FIRST STATE BANK OF PLEASANT DALE, APPELLEE, v. JOHN BORCHERS, APPELLANT.

FILED FEBRUARY 20, 1909. No. 15,545.

1. **Notes; DEFENSES.** The fact that the circumstances surrounding the purchase of a negotiable promissory note before its maturity were sufficient to excite the suspicion of a prudent man concerning the instrument will not defeat a recovery. The proof must establish that the purchase was made with knowledge of the facts concerning the execution of the note, that plaintiff believed that there was a defense to the instrument, or that he acted in bad faith or dishonestly.

2. ———: ———: INSTRUCTIONS. Defendant having testified that he was induced to sign a negotiable instrument upon the representation of the payee, which he relied on, that it was a copy of an agreement for the use of a farm gate, and that he could not read the English language, it was not error to instruct the jury, the evidence being considered, that it was defendant's duty to read the instrument or have it read to him, and, if he could not himself read the writing, to "otherwise learn the contents," so that he might not be imposed on and cause an innocent purchaser to suffer, and that it was for the jury to say from all of the facts and circumstances of the case whether defendant had been negligent in the care exercised by him to learn the contents of the note.
3. Payment. If a purchaser of a negotiable instrument gives the holder an ordinary bank draft therefor, payment is complete as soon as said draft has passed beyond the buyer's control.

APPEAL from the district court for Lancaster county:
ALBERT J. CORNISH, JUDGE. *Affirmed.*

Willard E. Stewart and George A. Adams, for appellant.

Hall, Woods & Pound and R. H. Smith, contra.

ROOT, J.

Action on a negotiable instrument by an endorsee thereof. Plaintiff prevailed, and defendant appealed.

The defense is that defendant's signature to the note in question was procured by fraud and deceit, and upon the payee's representation that it was a copy of an agreement relative to an option to purchase a farm gate; that defendant cannot read the English language, and relied on the payee's statements; also a denial that plaintiff was a *bona fide* purchaser. The testimony tends very strongly to prove that the payee did cause defendant to believe that he was merely signing a writing concerning a gate. The payee, on the day that the note was executed, sold it for nearly par to one Laune, and indorsed the note: "Without recourse. R. H. Browning." Laune sold the note to plaintiff about the 13th of July, 1905, and received \$100 therefor.

1. The first complaint is that the court refused to give instruction numbered "V" requested by defendant, but gave its instruction numbered "V." They are as follows:

"Where to an action on a promissory note by an indorsee thereof the defense interposed is fraud, or illegality in the inception of the note, or in procuring its execution, the burden of proof is upon the plaintiff to prove that he is a *bona fide* holder; that is, that he purchased and paid for the note without knowing that the maker claimed any defense thereto, and that he made such purchase before the note became due for a valuable consideration, and that such purchase was made in the usual course of business, without any notice of facts or circumstances which would prompt an ordinary prudent man to investigate, or make inquiry, which if followed up, or made, would have led to knowledge of such defense."

"The mere fact that circumstances at the time of the purchase of the note may be such as to excite suspicion in the mind of a prudent man is not sufficient to impugn the title of an innocent purchaser. The proof must go to the extent of showing that the purchaser purchased with knowledge of such facts and circumstances as shows want of honesty or bad faith on his part in the purchase of the note."

We have condemned an instruction that requires a purchaser of negotiable paper before maturity to follow up by inquiry any suspicious fact or circumstance relative to the note that may come to his attention at or before the date of his purchase. *First Nat. Bank v. Pennington*, 57 Neb. 404. To constitute bad faith, the buyer must have had knowledge of infirmities in the note, or have had a belief based on circumstances known to him that there was a defense thereto, or the evidence must tend to prove that the purchase was made under such circumstances as indicate bad faith or a want of honesty on the part of the indorsee. *Dobbins v. Oberman*, 17 Neb. 163; *Myers v. Bealer*, 30 Neb. 280; *First Nat. Bank v. Pennington*, *supra*; *Phelan v. Moss*, 67 Pa. St. 59, 5 Am. Rep. 402; *Second*

Nat. Bank v. Morgan, 165 Pa. St. 199, 44 Am. St. Rep. 652. Instruction "V" requested by defendant is not a correct statement of the law, nor is instruction "V" given by the court erroneous.

2. It is urged that instruction numbered "VII," given by the court, is erroneous. The portion criticised is as follows:

"Touching this, you are instructed that it is the duty of one signing his name to an instrument to read it, if he can read it, or to bring such ability to read as he possesses into use, so far as it may enable him to identify the character of the instrument, or, if he cannot read at all, to otherwise learn the contents of the instrument he is signing, so that he may not be imposed upon by fraud or sign a note that may cause innocent purchasers thereof to suffer. He is chargeable with any neglect in failing to perform this duty. Whether or not the defendant was guilty of any neglect in signing the note the way he did is a question of fact for you to determine from all the facts and circumstances of the case, taking into consideration the evidence as it may bear upon the question to what extent the defendant was illiterate, and whether or not he was without negligence in the care exercised by him to know the contents of the instrument before he signed it."

Counsel complains that the court did not in said instruction inform the jury that, if plaintiff was not an innocent purchaser, he could not take advantage of the negligence of defendant in not ascertaining the nature of the writing signed by him. The court, however, did not tell the jury that plaintiff could recover if defendant was negligent without regard to the *bona fides* of the bank. In instruction numbered "II" the jurors were told that plaintiff could not recover unless it purchased the "note in good faith before maturity, and for a valuable consideration, in the usual course of business." It is also argued that defendant was placed under the necessity of proving a greater degree of diligence than the law imposes, but we cannot agree with counsel. *Dinsmore & Co. v. Stimbert*,

12 Neb. 433; *Ruddell v. Fhalor*, 72 Ind. 533, 37 Am. Rep. 177; *Fisher v. Von Behren*, 70 Ind. 19, 36 Am. Rep. 162; *Bedell v. Herring*, 77 Cal. 572, 11 Am. St. Rep. 307; *Williams v. Stoll*, 79 Ind. 80, 41 Am. Rep. 604; *Lindley v. Hofman*, 22 Ind. App. 237; *Mackey v. Peterson*, 29 Minn. 298.

3. Upon defendant's request the court had instructed the jury that, if plaintiff before he paid for the note in suit learned that defendant claimed that it had been obtained by fraud, it ought not to have paid therefor; that it must use ordinary care to stop payment of the draft, and that it would not be a purchaser in good faith. The jury evidently requested further instructions, and the court then added to said instruction the words "if he failed to exercise such ordinary care," and then further instructed: "Touching this twelfth instruction, you are further instructed that by it is meant only that, if the plaintiff should get notice that the defendant claimed that the note was obtained by fraud and that he had a defense to that note before he had completed the purchase of the same, then it would become his duty not to complete the purchase. If, however, on the other hand, the evidence should show that at the time he learned of the defendant's defense to the note he had already purchased the same, so that as between the plaintiff bank and the owner of the note, Laune, the bank was then holden for the payment of the consideration, then in such case the bank would still be an innocent or *bona fide* purchaser. If at the time of receiving the notice the sale was so far completed by giving Mr. Laune credit on his passbook for that amount by the Columbia National Bank, so that as between Laune and the Columbia National Bank the purchase was completed, then in such case the plaintiff, being liable for the amount, although the draft was not yet cashed, and he must stop its payment, would be an innocent holder." In connection with his criticism of this amendment, counsel argues that the evidence disclosed that plaintiff had knowledge before paying for the note

that defendant claimed a defense thereto. The first purchaser from the payee offered the paper for discount to a bank in Lincoln where he kept an account, but the cashier stated that the instrument had originated in territory tributary to plaintiff, and it must be given the first opportunity to buy. About July 4 plaintiff's cashier, Ackerman, talked with the cashier of the Lincoln bank about the note, and again on the 10th of that month. Ackerman noticed that the note was indorsed "without recourse," and asked the reason, and whether there was anything wrong with it. The Lincoln man said that it had been deposited by one of their best customers, and that he had every reason to believe that it was all right. Ackerman then said to send it to him, and, if the signature was genuine, he would purchase the paper. The note was sent to plaintiff, and Ackerman compared the signature thereto with defendant's genuine signature. July 13, Laune inquired of the Lincoln bank what had been done with the note. Ackerman was communicated with over the telephone, and replied that plaintiff would take it and sent a draft to said bank for \$100. The Lincoln bank was plaintiff's correspondent, and credit was given Laune and plaintiff's account charged July 14. Ackerman testified that his first knowledge that defendant claimed a defense to the note was acquired August 7, whereas defendant asserts that he told him in the forenoon of the 13th of July that the instrument was procured by fraud. There is considerable evidence in the record corroborating both Ackerman and defendant, sufficient to support a finding for one party or the other, but it was for the jury to settle the issues of fact upon the conflicting testimony. The qualification to the instruction was not erroneous in the light of the testimony. If, as indicated by plaintiff's evidence, Laune was credited on the books of the Lincoln bank with plaintiff's draft before it had notice of any infirmity in the note, the consideration for said purchase was as completely beyond

Nebraska Central Building & Loan Ass'n v. McCandless.

plaintiff's control as if it had paid currency to Laune therefor.

The official reporter read for plaintiff the testimony of an absent witness who had testified on the former trial of the case. It was shown that the witness was in Seward county, and that an unsuccessful attempt had been made to procure his presence. Defendant also caused the reporter to read the testimony of an absent witness, and we are satisfied that the judgment should not be reversed because the witness was not produced in court.

Defendant was evidently imposed upon by the payee of the note, but he has had a fair trial before a jury on all of the disputed facts. The instructions were complete and fair, and now that the jury has found that plaintiff purchased the note in question before its maturity in the usual course of business *bona fide* for a valuable consideration, and without notice of any infirmity therein, the judgment should be and is

AFFIRMED.

NEBRASKA CENTRAL BUILDING & LOAN ASSOCIATION, APPELLEE, v. GERTRUDE C. MCCANDLESS ET AL., APPELLEES; GRACE E. WAISNER, APPELLANT.

FILED FEBRUARY 20, 1909. No. 15,553.

Mortgages: VALIDITY. M., an attorney at law, was indebted in a considerable sum for money of a client which he had converted to his own use. A representative of that client went to the home of M. in his absence and stated to his wife, who was there alone, that her husband had used large sums of money that belonged to said client, who was also a niece of M., and that, unless she executed a mortgage on her homestead, said representative would forthwith commence "proceedings." M.'s wife was in ill health, nervous, excitable, and unaccustomed to transact any kind of business, and believed and understood from the statements made to her that the proceedings referred to were criminal prosecutions, and she, acting under the pressure of a desire to save her husband, agreed to sign the mortgage. She went that night to

the train to meet her husband, and insisted that he should at once go to his office and with her execute said mortgage. She prevailed, and the instrument was executed. *Held*, That in the light of the facts, notwithstanding she had the benefit of the presence and protection of her husband at and just before the time she signed the mortgage, she was not a free agent in that particular, and as the rights of third persons had not intervened, and she had not received any consideration for signing the mortgage, that a court of equity would not enforce its provisions.

APPEAL from the district court for Gage county: JOHN B. RAPER, JUDGE. *Affirmed*.

N. K. Griggs, Samuel Rinaker and Metz, Sackett & Metz, for appellant.

E. N. Kauffman, A. D. McCandless and O. E. Kretsinger, contra.

ROOT, J.

Cross-action to foreclose a mortgage. Defense that the property described in the conveyance was the separate property and homestead of the mortgagor, a married woman, and that said instrument was secured by "force, fraud, terrorism and coercion exerted upon her in the absence of her husband," by an attorney who represented the mortgagee. There was judgment for the defendant, and the mortgagee, Grace E. Waisner, appeals.

There are some undisputed and many controverted facts in the case. The evidence is clear that the lots described in the mortgage constitute the homestead and separate property of Mrs. McCandless; that she is a married woman, and with her husband has occupied said property as a homestead for some 15 years last past; that the lots are not worth to exceed \$2,500 and are incumbered by a *bona fide* prior mortgage for \$800. Mr. McCandless is an attorney at law, and preceding the execution of the contested mortgage, as such lawyer, had received a large sum of money for his client, Mrs. Waisner, and was owing her on said account an indefinite sum of

money approximating \$7,000. The mortgagee had made her home with Mr. McCandless when she was a girl, and was in some degree related to him. Mrs. Waisner, who now resides in Wyoming, sent an attorney from that state to Nebraska to settle with McCandless and collect the debt or procure security for its payment. In December, 1905, said lawyer interviewed McCandless, and they seem to have agreed upon a balance of \$7,000 as due Mrs. Waisner. It may be that this sum was subject to a deduction for an attorney's fee, but the record is not clear on this point. The Wyoming attorney was willing to accept in full settlement from McCandless seven of his notes for \$500 each, one of which would mature every year for seven years, but insisted that payment thereof should be secured. To this point there is practical agreement in the evidence, but from thence forward the witnesses are in sharp conflict. The Wyoming attorney testified that McCandless said that he owned no property other than his home, and would incumber it to secure said notes if his wife would sign the mortgage, and that he would try and induce her to do so when she returned home; she being away on a visit at the time. The attorney then went to Illinois, and within ten days sent a telegram of inquiry to McCandless, and, upon receipt of an answer that security would not be given, returned at once to Wymore, where McCandless resides, and, not finding that gentleman at home, went to his residence and talked with Mrs. McCandless. The lady was then 55 years of age, in ill health, highly nervous, and totally inexperienced in business affairs. Mr. McCandless had not informed his wife about his transaction with the Wyoming lawyer, and the latter informed her that her husband had used money that belonged to a client; that he was surprised that McCandless had not informed his wife about the arrangement for a mortgage; that he must be insane, or, as the attorney says, "foolish," not to have the mortgage executed, and that, if it was not given, he would at once commence "proceedings." The woman testified that she

understood the word "proceedings" to refer to a criminal prosecution against her husband, whereas the attorney insists that he did not intend to convey that idea, but referred, and intended to refer, to a civil action only, and that neither the woman nor the court would be justified in giving any other construction to the language employed.

In the instant case we are not dealing with legal or lay definitions of a word, but whether this woman understood, and had reasonable ground to believe, it was used with reference to a criminal prosecution. The language used by the attorney indicates a discriminating mind, but one can read between the lines a veiled threat, a purpose to convey a sinister meaning, that he did not intend to content himself with recourse to a civil action to compel her husband to make restitution for the money he had wrongfully and, possibly, criminally converted to his own use. Her future conduct is incompatible with any understanding other than testified to by her. Mr. McCandless returned about 8 o'clock that evening. It was a cold, wet, disagreeable night in January. She had never before in their married life gone to the depot to meet him, and yet this night she appeared there improperly clothed for the street, in a highly excitable and nervous condition, and insisted that the mortgage should be given forthwith. Her husband went with her to his office, where they found the vigilant collector waiting for them. The husband and wife testified that Mr. McCandless did all in his power to dissuade her from signing the mortgage, but that she insisted that it be done, and finally the instrument was executed. The attorney representing Mrs. Waisner testified that during the time he called upon Mrs. McCandless in the afternoon she was cool and collected, perfectly willing to give the mortgage, and remained in the same condition during the conference at the office, and that both husband and wife were satisfied with and desired to execute said instrument. It is undisputed and significant that all parties remained in the office over two hours, a

fact inconsistent with the mere writing of a mortgage and seven notes; all conditions whereof having been agreed upon beforehand. If Mrs. McCandless desired to give the mortgage solely as a matter of justice and for the pecuniary advantage of her husband, she would scarcely have made a trip in the storm and darkness to the depot that night, without regard to her clothing or appearance, or have insisted strenuously, over her husband's objections, that the mortgage be given. Her statement in the office that, "I would not have you arrested or charged with a crime for forty such homes as that," her mental distress at the time and complete prostration the succeeding day, all tend strongly to prove that she was acting under great pressure and the fear that her husband was in imminent danger, and that the mortgage must be given for his protection.

Although the circumstances of this case are unusual, and the woman had the benefit of the presence and protection of her husband at the closing scene of the drama, staged by the representative of Mrs. Waisner, we are not satisfied that the mortgage represents the free consent of the mortgagor. "The consent by which agreements are formed ought to be free. If the consent of any of the contracting parties is extorted by violence, the contract is vicious, * * * and the person whose consent is extorted, or his heirs, may procure it to be annulled by letters of rescission." 1 Pothier (Evans), Obligations, p. 115. And cases may occur where one party to a contract in terror, under threats short of duress, does not act with a free will, and, if it is made to appear to a court of equity that he was not a free agent, that court will protect him. 1 Story, Equity Jurisprudence (13th ed.), sec. 239; Bispham, Principles of Equity (6th ed.), sec. 230. In the instant case the rights of third persons do not intervene, the wife received no consideration whatever for her act, nor has Mrs. Waisner lost anything by the receipt of this mortgage. She may have scaled down her claim against McCandless, but, if it was in consideration of the giving

of the mortgage, she would not be bound by that reduction. As said by Lord Chelmsford in *Williams v. Bayley*, 35 L. J. Ch. (Eng.) 717, in a case quite in point: "A contract to give security for the debt of another, which is a contract without consideration, is, above all things, a contract which should be based upon the free and voluntary agency of the individual who enters into it." In that case a son had forged his father's name to bills which he thereafter discounted. At a meeting attended by the officers of the bank and the father the statement was made by one of the former to the latter: "We do not wish to exercise pressure on you if it can be satisfactorily arranged." No demand was made for security, but the father through his solicitor negotiated with said creditors and ultimately adopted the signatures to the forged bills and gave said bankers title deeds to a colliery owned by him. He also had a considerable deposit in his own name with said bankers. The son soon thereafter absconded and was declared a bankrupt. The bankers refused to honor the father's check against his own deposit, and litigation ensued which involved all features of said transaction. The vice chancellor held that the father was improperly influenced and driven to sign the agreement by his fears, which were worked upon by the appellants "making him see that they had acquired the power of prosecuting his son." The decision of the vice chancellor was sustained in the house of lords, wherein it was held that neither a distinct threat to prosecute, nor a promise of immunity to the son, was necessary to deprive the father of the exercise of that free will essential to uphold his contracts of suretyship. *Williams v. Bayley*, 35 L. J. Ch. (Eng.) 717, L. R. 1 H. L. 200, 12 Jur. (n. s.), 875, 14 L. T. 802. In *Lomerson v. Johnston*, 47 N. J. Eq. 312, a creditor of the husband had gone to the latter's wife, and by stating that her husband had been guilty of embezzlement and could be put in jail therefor, but without directly stating that a criminal prosecution would be instituted, secured a mortgage from her upon her separate

Helwig v. Aulabaugh.

property. *Held*, That the instrument was void at her election, because the pressure exerted had destroyed the mortgagor's free agency so that she did not act according to her free will. See, also, *Eadie v. Slimmon*, 26 N. Y. 9, 82 Am. Dec 395; *Bell v. Campbell*, 123 Mo. 1; *Bryant v. Peck & Whipple Co.*, 154 Mass. 460; *Hargreaves v. Korcek*, 44 Neb. 660; *Pride v. Baker*, 64 S. W. (Tenn.) 329.

In the instant case the representative of Mrs. Waisner did not in positive and direct language state that he would cause her husband to be prosecuted if the mortgage was not given, but he first disclosed to her that he possessed the power to institute or cause to have instituted a criminal prosecution against her husband, and then told her that, if the mortgage was not signed, he would commence proceedings against her husband, and thereby excited in her mind extreme apprehension for his safety, and we believe secured the execution of the instrument in suit. We think the district judge who saw and heard all of the witnesses whose evidence appears in the record was justified in concluding, as he did, that the mortgage was secured from Mrs. McCandless by working on her fears, that it was not the result of her free will and voluntary action, and that the mortgagee was not entitled to the assistance of a court of equity to enforce its provisions.

The judgment of the district court therefore is

AFFIRMED.

**ALBERT HELWIG, APPELLEE, v. GEORGE N. AULABAUGH,
APPELLANT.**

FILED FEBRUARY 20, 1909. No. 15,502.

1. **Master and Servant: CONTRACT: EVIDENCE.** A contract of employment may be proved by letters exchanged between the parties in due course of mail.
2. **Evidence: LETTERS.** Where the genuineness of a letter has not been questioned, it may be introduced in evidence on competent testi-

Helwig v. Aulabaugh.

mony that it was received in due course of mail in reply to a letter mailed to the writer.

3. **Trial: INSTRUCTIONS: WAIVER.** The right of a litigant to have a particular issue of fact submitted to the jury by an instruction may be waived by conduct showing that he neither requested such an instruction nor raised the question in his motion for a new trial.
4. **Master and Servant: DISCHARGE: DAMAGES.** It is the duty of an employee who has been wrongfully discharged in violation of his contract to make reasonable efforts to avoid loss by securing other employment.
5. ———: ———: ———: **INSTRUCTIONS.** In a suit by an employee to recover damages for his wrongful discharge in violation of a written contract, an undenied allegation of the petition, stating the amount plaintiff subsequently earned elsewhere, when established by uncontradicted evidence, presents no issue of fact for the determination of the jury.

APPEAL from the district court for Douglas county:
WILLIS G. SEARS, JUDGE. *Affirmed.*

T. W. Blackburn, for appellant.

Isidor Ziegler, contra.

ROSE, J.

This is an action by an employee against his employer for damages for breach of the contract of employment. The material facts alleged in the petition may be summarized as follows: By exchange of letters in due course of mail plaintiff was hired for a year as a cutter and workman in defendant's furriery in Omaha, upon the following terms: From August 1, 1905, to September 4, 1905, plaintiff was to receive \$16.25 a week; from September 4, 1905, to January 20, 1906, \$25 a week; and from January 20, 1906, to August 1, 1906, \$16.25 a week. Plaintiff entered upon the duties of his contract and continued in defendant's employ for a period of seven months, or until March 5, 1906, when he was wrongfully discharged in violation of his contract and deprived of

his wages of \$16.25 a week from March 5, 1906, to July 31, 1906, amounting to \$346.66. An unpaid balance of \$10 increased his claim to \$356.66. Between March 5, 1906, and August 1, 1906, plaintiff, though ready and willing to perform his part of the contract in full, obtained employment elsewhere and received as compensation \$55.50, and was unable to obtain other employment or earn a greater sum. The prayer was for judgment for \$301.16, or the difference between what he should have received under his contract and the amount earned after he was discharged.

In the answer defendant admitted plaintiff was in his employ for seven months, but alleged he left it voluntarily March 3, 1906, confessing his inability to perform his duties, was paid in full for his services, and never afterwards returned or offered to return to defendant's employ. In addition the answer alleges: "Defendant denies each and every allegation in said petition contained, save and except as same may be admitted or pleaded to in this amended and substituted answer. * * * Defendant admits that after plaintiff left defendant's employ he was engaged in other employment, but defendant does not know with whom he was employed, when, where or how long he was employed, or what compensation he received." The allegations of defense are denied by a reply. The trial resulted in a verdict and judgment for plaintiff for \$308.14. Defendant appeals.

The question of the making of the contract was not submitted to the jury by an instruction, and this is assigned as error on the ground that it took from the triers of fact an issue raised by the pleadings. In this connection it is argued that the letters were erroneously admitted in evidence and that the existence of the contract was not established. It was shown by competent testimony that the letters from defendant were received in due course of mail in answer to letters written to him by plaintiff, and that in pursuance of defendant's correspondence plaintiff came from Minneapolis to Omaha on

transportation inclosed in one of the letters, and worked for defendant seven months, receiving weekly the stipulated wages. The letters were properly admitted in evidence. *People's Nat. Bank v. Geisthardt*, 55 Neb. 232. Defendant offered no evidence to question the genuineness of the letters or to dispute the testimony relating to them, and they showed the contract to be as pleaded in the petition. There was, therefore, no disputed question of fact as to the making of the contract to submit to the jury, and the action of the court in this respect was without error.

Another point earnestly presented by defendant is the failure of the court to instruct the jury that it was incumbent on plaintiff to prove he was ready and willing to carry out his contract, notwithstanding he was wrongfully discharged. It is insisted this fact was in issue, with evidence on both sides, and ought to have been submitted to the jury by an instruction. Defendant did not ask for such an instruction, but insists that it should have been given without a request. The record shows he did not except to the failure of the court to give such an instruction or raise the question in his motion for a new trial. This was a waiver of the error, if any. *Barney v. Pinkham*, 37 Neb. 664; *Sanford v. Craig*, 52 Neb. 483.

Complaint is also made that the law of avoidable consequences required the court to instruct the jury that a discharged employee must not only be ready and willing to perform his contract, but that he must be willing to accept other work, if he can procure it. Plaintiff by his petition and the trial court by instructions recognized the rule that it is the duty of an employee who has been wrongfully discharged in violation of his contract to make reasonable efforts to avoid loss by securing other employment. Plaintiff alleged in his petition that after he was discharged he obtained employment of various kinds at different places, stating the names of his employers and the amount received from each. He then alleged

Eastwood v. Klamme.

the total sum so received was \$55.50, and that he "was unable to obtain other employment or earn a greater sum." The trial court was justified in assuming this allegation was not denied by the averments already quoted from the answer, or by any other allegations thereof. In addition, the allegation was established by uncontradicted evidence. There was, therefore, no fact in issue as to plaintiff's diligence in seeking other employment, or as to the amount earned by him elsewhere, and there was no occasion to submit those questions to the jury. The court did instruct, however, that the sum of \$55.50 should be credited on any sum due from defendant to plaintiff. The action of the trial court was also in harmony with the doctrine that the burden is on an employer who discharges his employee in violation of his contract of employment to show in mitigation of damages that the latter by the exercise of due diligence in securing other employment might have reduced the loss. *Wirth v. Calhoun*, 64 Neb. 316; *Bissel v. Vermillion Farmers Elevator Co.*, 102 Minn. 229.

Complaint is also made of other rulings and instructions relating to evidence, but a careful examination of each shows that defendant has not presented a record disclosing any reversible error.

It follows that the judgment must be

AFFIRMED.

HANNAH EASTWOOD ET AL., APPELLEES, v. JACOB KLAMM
ET AL., APPELLANTS.

FILED FEBRUARY 20, 1909. No. 15,538.

1. **New Trial: VERDICT: EVIDENCE.** In an action by a wife and minor children against three retail liquor dealers for loss of support occasioned by the sale of intoxicating liquors to the husband and father of plaintiffs who is an habitual drunkard, where the jury return their verdict in favor of the plaintiffs as against two of such defendants and in favor of the third, that fact alone is not

sufficient to establish the fact that the jury were governed by partiality or prejudice, and affords no ground for setting aside the verdict of the jury if the evidence is sufficient to sustain the verdict as to the two defendants against whom the jury find.

2. **Intoxicating Liquors: EVIDENCE: REVIEW.** And where in such an action the court admits testimony to the effect that when the husband and father was sober he was kind, but when intoxicated he was unkind and quarrelsome, and that during the time the husband was incapacitated from earning a living the wife was compelled to perform menial labor and to accept aid from the county, *held* not error.
3. ———: ———: ———. And in such a case where the evidence shows that the husband, while in a state of intoxication produced by liquors furnished him by defendants, fell and broke a leg, it is not error to permit the plaintiffs to testify that by reason of such injury the husband "is not able to work like he did before he received such injury."

APPEAL from the district court for Lancaster county:
LINCOLN FROST, JUDGE. *Affirmed.*

Strode & Strode, for appellants.

John M. Stewart and *George A. Adams*, *contra.*

FAWCETT, J.

This is an action for damages by Hannah Eastwood for herself and as next friend for her three minor children against Jacob Klamm, John V. Helm and one William Splain, who were retail liquor dealers in the city of Lincoln, and the American Bonding Company as their bondsmen. The action was brought under the provisions of chapter 50, Comp. St. 1907. The petition alleges substantially that prior to 1902 John Eastwood, the husband of Hannah and father of the other plaintiffs, was an able-bodied man and skilled mechanic, and gave his family, who were entirely dependent upon him, a comfortable support; that during the time from 1902 to 1904 he became addicted to the immoderate use of intoxicating liquors, which was contributed to by the defendants; that by reason thereof his ability to earn a living became

greatly impaired; that the moneys which he had previously accumulated to the amount of about \$600 had been dissipated and his income squandered; that finally on February 14, 1904, while in a state of intoxication, contributed to by the defendants, the said Eastwood fell and fractured his leg, and received injuries from which he was compelled to remain in bed for nine weeks and was confined in the house for six months, during which time he was totally unable to work or earn a living or contribute anything to the support of the family; that such injuries to his leg have caused him to become a permanent cripple, and thereby has permanently impaired his ability to support his wife and children; that by reason thereof plaintiff Hannah Eastwood has been compelled to go out and perform menial labor to support herself and their said minor children; and that the defendant American Bonding Company is the surety upon the bonds of the other defendants as retail liquor dealers. The first three defendants admit the business in which they are engaged, the giving of the bond, and deny all of the other allegations in plaintiffs' petition. The answer of the bonding company admits the giving of the bonds, and denies all of the other allegations. There was a trial to the court and a jury, which resulted in a verdict in favor of the plaintiffs against all of the defendants, excepting defendant William Splain, and from a judgment on such verdict this appeal is prosecuted.

In their brief defendants present two assignments only: "(1) The court erred in finding against the defendants Jacob Klammm and John V. Helm and the surety on their bonds and in favor of the defendant William Splain. (2) The court erred in admitting evidence that was incompetent, immaterial and irrelevant over the objection of the defendants."

In support of the first assignment, they set out a portion of the testimony given by John Eastwood and his son Richard as to the purchase of liquors at the saloon of defendant Splain on the night when John Eastwood

received the injury above referred to, and then state that it was upon the testimony of the same two witnesses that the jury found against defendants Klamm and Helm. Counsel then argue that, if the jury believed that the testimony of these two witnesses relating to the purchase of intoxicating liquors at Splain's saloon was unworthy of belief, then there is no reason why they should have credited that testimony and based a finding thereon against the defendants Klamm and Helm, and that the fact that the jury so found establishes the fact that the jury were governed by partiality and prejudice, and that for this reason the verdict ought to be set aside and a new trial granted. This is the only argument presented in support of the first assignment. There are at least two reasons why the argument is not sound: First, conceding that the testimony of these two witnesses was the same as to each of the three defendants, still the fact that the jury may have released the defendant Splain would afford no reason for vacating their verdict as to the other two defendants if the evidence was sufficient to sustain the verdict as to them; second, the evidence of Eastwood and his son showed that, when the liquor was sold in Klamm's saloon, Mr. Klamm and his son and bartender were all present, and all three took part in the sale of the liquor to Eastwood. Their testimony further shows that at Helm's saloon Helm was present and participated in the sale of the liquors. As to Splain, their testimony was different. The son testifies that, while he was in Splain's saloon with his father, neither Splain nor his son was present; that the liquors were sold to them by the bartender only; and Mr. Eastwood himself is not certain if Splain was present. He testifies that he thinks he was there. Splain's testimony shows that he was not there. The jury may have been influenced by this testimony in finding in favor of defendant Splain and against the other defendants.

In support of the second assignment, defendants argue that the court erred in permitting Mrs. Alice Server, a

Buffalo County v. Kearney County.

daughter of the plaintiff, to testify that when her father was not drinking he was kind, but that when he was intoxicated he was quarrelsome, and in permitting Mrs. Dorothea Barker, another daughter, to testify that when the father was drinking he was cross and cranky; that the court also erred in permitting the plaintiff Hannah Eastwood to testify that during the time her husband was laid up she had to call on the county for help, and also in permitting her to testify that "he is not able to work now like he did before he got his leg broke." The admission of this testimony was not error. *Brockway v. Patterson*, 72 Mich. 122; *Buck v. Maddock*, 167 Ill. 219; 1 Joyce, Damages, sec. 568; *Fox v. Wunderlich*, 64 Ia. 187; *Jockers v. Borgman*, 29 Kan. 109; *Young v. Beveridge*, 81 Neb. 180.

Defendants make no complaint of the instructions given by the court or the amount of plaintiffs' recovery. The case seems to have been fairly tried and properly submitted to the jury. Perceiving no error in the record, the judgment of the district court is

AFFIRMED.

BUFFALO COUNTY, APPELLEE, v. KEARNEY COUNTY,
APPELLANT.

FILED FEBRUARY 20, 1909. No. 15,551.

1. **Counties: BRIDGE REPAIRS.** "A county which refuses to enter into a contract with an adjoining county to repair a bridge across a stream dividing the counties is liable to the county making the repairs under contract for 'such proportion of the cost of making said repairs as it ought to pay, not exceeding one-half of the full amount so expended,' when the county making the repairs has followed the procedure pointed out by the statute as to notice," etc. *Dodge County v. Saunders County*, 77 Neb. 787.
2. ———: ———: **ISSUES.** "Where the proper steps have been taken to render an adjoining county liable for the repair of such a bridge, and where an issue is raised as to the necessity of the

Buffalo County v. Kearney County.

repairs or as to the amount paid being more than the actual and reasonable cost thereof, then the amount that the defaulting county ought to pay is a question for the jury, but, if no such issue is tendered, the county in default is liable for one-half of the cost of repairs." *Dodge County v. Saunders County*, 77 Neb. 787.

APPEAL from the district court for Kearney county:
ED L. ADAMS, JUDGE. *Affirmed.*

C. P. Anderbery and *Joel Hull*, for appellant.

J. M. Easterling and *H. M. Sinclair*, contra.

FAWCETT, J.

This is an action by plaintiff, Buffalo county, to recover from defendant, Kearney county, one-half of the cost for the rebuilding and repairing of 800 feet of the south end of a bridge over the Platte river immediately south of the city of Kearney, and at a point where said river is the dividing line between the two counties. The work was procured to be done by plaintiff under a contract with the Standard Bridge Company, and the cost has been paid by plaintiff. Prior to the taking of any steps in the making of the contract with the bridge company plaintiff duly served upon the board of supervisors of defendant a written notice, in which their attention was called to the necessity for doing such construction and repair work, and requesting the supervisors of defendant to cooperate with plaintiff in the proposed work. The board of supervisors of defendant on December 22, 1904, by motion entered of record, resolved to take no action relative to cooperating with plaintiff. Thereupon plaintiff served another notice upon defendant, stating that it had been duly determined to enter into a contract for the material, construction and completion of 800 feet of bridge, and that plaintiff had advertised for bids therefor, and proposed, if suitable bids were offered, to enter into a contract for such construction and repair work, and request-

Buffalo County v. Kearney County.

ing defendant to join in said contract. The supervisors of defendant county thereupon, by motion duly entered of record, refused to enter into any such contract with Buffalo county. Buffalo county then proceeded to advertise for bids, and, after the contract with the bridge company had been prepared, forwarded the same to defendant with a request that it join in the execution thereof. Thereupon the supervisors of defendant county, by resolution entered of record, refused to enter into any such contract. Buffalo county then proceeded with the contract, had the work done thereunder, and paid for the same, the total cost of the work aggregating \$5,732.42, and filed with the county board of defendant county a claim, duly verified, setting out the items of its expenditures, and requesting defendant county to pay one-half thereof, viz., \$2,866.21. The claim was rejected, whereupon plaintiff appealed to the district court for Kearney county, notice of which appeal was duly served upon defendant. When the bridge company entered upon the work of reconstructing the bridge, it was found necessary to reconstruct 858 instead of 800 feet, as stated in the notice served upon defendant. It was also deemed advisable to expend other sums of money for extras and to construct a number of ice breaks; but on the trial of the case plaintiff abandoned its claim to compensation for the extra 58 feet of bridge construction or for any of the other extras referred to, and demanded a judgment simply for one-half of the construction of 800 feet of the bridge, which under defendant's contract with the bridge company amounted to \$1,956. For answer the defendant admitted that the plaintiff and defendant is each a body politic and corporate by the name and style, respectively, of the county of Buffalo and the county of Kearney, and denied each and every other allegation in plaintiff's petition, and then set up several other alleged defenses which we do not deem it necessary to set out at length.

The first of these defenses is based upon *State v. Kearney County*, 12 Neb. 6. Another in effect is that the resi-

Buffalo County v. Kearney County.

dents of Buffalo county are far more interested in, and will be more greatly benefited by, the bridge than the residents of Kearney county; that the county seat of plaintiff county will be greatly benefited by increased trade which it will receive from the citizens of defendant county; and that Kearney county is interested to a small degree only in the use of such bridge. Another is to the effect that in landing such bridge on the south edge or bank in defendant county the same was landed on ground owned by private parties (the evidence, however, shows that each end of the bridge connects with a public road); that the bridge was built and accepted by plaintiff for the exclusive benefit of itself and the city of Kearney; that said bridge was built prior to the enactment of sections 6085-6088, Ann. St. 1903, which sections originally became laws and in force June, 1879, being more than five years after the completion of said bridge; and, lastly, that by virtue of an act "To locate a state road from Kearney Junction, Buffalo county, to Bloomington, Franklin county, and thence to intersect a state road at the Kansas line, at the southwest corner of the southeast $\frac{1}{4}$ of section 34, town 1, range 16 west,' approved February 19, 1875 (laws 1875, pp. 301-303), the said bridge became the exclusive charge of Buffalo and Franklin counties, Nebraska, and as such was accepted by said counties, and any attempted repeal therefrom is contrary to section 1, art. XVI, entitled 'Schedule,' of the constitution of the state of Nebraska, and also contrary to section 15, art. III of the constitution of Nebraska, and also contrary to section 3, art. I of the constitution of Nebraska, and also contrary to the constitution of the United States, in that it deprives the defendant of its property without due process of law." The reply was a general denial of all allegations in the answer, "except the express admissions therein contained."

Before the trial was entered upon certain taxpayers of Kearney county appeared as interveners, and were permitted to file separate answers, which we do not deem it

necessary to set out or refer to in this opinion further than to say that their intervention was entirely unnecessary. We think the argument of counsel for plaintiff is sound that these interveners "have no rights in this controversy and no standing in court. It is a universal rule of law that no one has any right to intervene in any action unless he has some right to protect, which is not being protected." Kearney county through its legally constituted authorities was vigorously and ably doing everything that could be done to protect any rights which the defendant might have, and we see no reason why these taxpayers should have incumbered the record by intervention.

On the trial of the case plaintiff introduced the documentary evidence showing the various notices to and demands upon defendant to join in the construction and repair work and in the execution of the contract therefor, and the several refusals of the defendant above set out. It also furnished full and complete proof of its compliance with the law in regard to advertising for bids, its acceptance of the lowest bid, and entering into the contract, the doing of the work and the payment therefor. When both sides had rested, the court directed a verdict in favor of the plaintiff for one-half of the cost of reconstructing and repairing the 800 feet of the bridge referred to in the sum of \$1,956, and upon a verdict rendered in accordance with such instruction rendered judgment, from which this appeal is prosecuted. In its brief defendant sets out sections 87-89, ch. 78, Comp. St. 1907, and then vigorously assails the amendment of 1899 of section 88 as unconstitutional and void. The decisions of this court in *Cass County v. Sarpy County*, 63 Neb. 813, and on rehearing in 66 Neb. 476, and again on rehearing in 72 Neb. 93, are also vigorously assailed. This court in the three decisions referred to and in *Iske v. State*, 72 Neb. 278, *Saline County v. Gage County*, 66 Neb. 844, and *Dodge County v. Saunders County*, 77 Neb. 787, has so thoroughly considered and decided all of the questions in-

Gutru v. McVicker.

sisted upon in defendant's brief that we must decline to again consider them. We have carefully reexamined all of those cases, and are entirely satisfied with the conclusions therein reached. The district court very properly followed the rule announced in those cases. The fact that the bridge in question was originally built prior to the enactment of the sections of statute pleaded by defendant and under which plaintiff is seeking to enforce contribution is immaterial, as such matters are at all times subject to regulation by the legislature.

The judgment of the district court is

AFFIRMED.

LEVI GUTRU, GUARDIAN, APPELLANT, v. JAMES MCVICKER,
APPELLEE.

FILED FEBRUARY 20, 1909. No. 15,503.

Insane Persons: CONVEYANCES: SETTING ASIDE: EVIDENCE. In an action by a guardian of an alleged incompetent person to set aside his ward's conveyances of real estate, made before the appointment of such guardian, on the ground of mental incompetency, and for fraud and imposition by the grantee practised upon the grantor, the testimony examined, discussed in the opinion, and held sufficient to sustain the decree for defendant upholding the validity of the conveyances.

APPEAL from the district court for Dodge county: CONRAD HOLLENBECK, JUDGE. *Affirmed.*

John J. Sullivan and H. Halderson, for appellant.

E. F. Gray, contra.

DEAN, J.

This is an action tried in the district court for Dodge county, wherein the appellant, who was plaintiff therein, and is hereinafter called plaintiff, in substance alleges his appointment on February 14, 1907, as guardian of one

Gutru v. McVicker.

Ole Ramstad, then about 80 years of age, and who "now is, and for more than 25 years last past has been, a man of feeble intellect and mentally incompetent to transact business, or to have the charge, management or control of his property," and who it is alleged "was always mentally feeble, part of the time wholly demented"; that for over 25 years last past said Ramstad has been the equitable owner and in full possession and occupancy of 160 acres of farm land in Dodge county; that on January 20, 1887, 80 acres thereof was deeded land, the other 80 acres being held by him under a contract of purchase from the Union Pacific Railroad Company; that on said date the defendant, who had long been a neighbor and professed friend and confidential adviser of said Ramstad, induced him, without consideration to execute and deliver to him a warranty deed to the deeded tract and an assignment of the railroad contract; that there were then incumbrances on said land amounting to less than 5 per cent. of its then value, which were thereafter paid by defendant, who took a deed of the railroad land to himself; that said Ramstad has by himself or tenant for over 25 years last past continuously occupied said land; that on May 7, 1896, defendant induced Ramstad to accept from him a life lease to the land at an expressed annual rental of \$1; that no rent was ever demanded or paid; that said instruments are fraudulent and create a cloud upon Ramstad's title. Plaintiff prays for cancelation thereof, and for a conveyance of the land from defendant to Ramstad, and that the title be quieted in Ramstad.

Appellee, who was defendant in the district court, and is hereinafter called defendant, answered, denying generally and specifically all material allegations of the petition, but admitted the execution and delivery of the deed and assignment and lease, and alleged payment by himself of said incumbrances and about \$100 to Ramstad, all in pursuance of an agreement of purchase of said land from Ramstad made on January 20, 1887, subject to an agreement for a life estate therein, reserved by Ramstad,

which was reduced to writing May 7, 1896; that Ramstad agreed to and did pay all taxes subsequent to January 20, 1887; that plaintiff and Ramstad conspired to defraud defendant; that plaintiff's causes of action are barred by the statute of limitations. Plaintiff's reply denies every statement of new matter in the answer, except such as admit allegations in the petition. Upon issues joined and trial had defendant had judgment, and plaintiff appeals.

Upon the question of the mental competency of Ole Ramstad considerable testimony was introduced on both sides, and on the part of plaintiff some of it related to a time somewhat remote from the date of the execution of the instruments which form the basis of this action. One of his witnesses on this point testified he had not seen Ramstad to exceed four times within 30 years, the last time before the trial being in 1894, while another first made his acquaintance in 1899 or 1900. The testimony of another relates to incidents occurring "in 1887 or 1888" when the witness was 13 years of age. The proof shows Ramstad was born in Norway, and came to the United States "the year Fremont run for president," as he expresses it; that he never married and is about 80 years of age, and for many years before the trial lived alone in a farm house in Dodge county, doing his own housework, his sole companions being two or three favorite dogs. It is in evidence that he destroyed some of these animals before his departure from home to be gone a short time, so that, as he said, "they would not worry after him while he was gone"; that he then buried them, marking the burial place with sticks; that he dug a hole beside his house "about a foot around" that he might there "listen to the house rot down"; that he "told about having dreams and visions"; that he said he destroyed his dogs, fearing he would become ill and die, and they would devour his remains; that he told a witness he feared the designs of a certain matrimonially inclined female who was about to engage his attention in a

breach of promise suit, and that he was going to Fremont to "fix his land so that this woman could not get it," and that "he would kill himself before he would submit to her demands"; that he ordered and erected a monument, and "wanted to be buried with his dogs." It is in evidence by the testimony of six or seven witnesses who were called on the part of plaintiff that one of Ramstad's most pronounced peculiarities was that of "talking to himself," and from the evidence it would seem with the utmost impartiality as between his own and the English language. The fact that he used both languages seemed to add to the prominence of this feature, and gave rise to some testimony indicating that the witnesses could not understand him. Some stress is laid upon this feature by counsel in his brief and in the oral argument. But if the courts accept proof of this characteristic as conclusive or even *prima facie* evidence of "mental incompetency to transact business," the sphere of the guardian's activity may thereby become so greatly enlarged as to prove burdensome to him and embarrassing to the community.

Ole Ramstad, the ward, was sworn and testified on the part of plaintiff. He was not interrogated with reference to the alleged designing woman, nor in regard to his alleged statement of a purpose once entertained by him of placing his property beyond her reach. He testified it was agreed between him and Gutru the latter was to be appointed his guardian that this suit might be brought. It is shown by Ramstad's testimony that, from the time he executed the conveyances to the time of trial in the district court in July, 1907, from the proceeds of the land in which he retained the life lease, and by investments in town property in the village of Rogers, he, unaided and alone, had accumulated property, both real and personal, of the value of several thousand dollars. He testified that at the time of the trial he owned three houses in Rogers that rented for about \$5, \$6 and \$8 a month, respectively, and 28 business lots therein, one of them being worth \$500. The ward's testimony thus tends

at least to rebut his guardian's allegation of mental incompetency "to transact business."

Levi Gutru, plaintiff, testified he first met Ramstad in July, 1906; that Ramstad said to him he wanted witness "to look after his business, and he said I should support him and take care of him, and, if there was anything left, I should have it." Witness testified a will and power of attorney were executed by Ramstad the second time he met him, and that he, the witness, suggested that he "had to have something to look after his business" and the power of attorney was then made, and he repeats Ramstad said, "if anything was left, I could have it." He says at that time he had not discovered his mental condition, but "ascertained the fact later." County Judge Mapes of Colfax county testified that about six months before this action was tried the plaintiff and his ward, Ramstad, called at his office in Schuyler to inquire about the appointment of a guardian for the latter, at which time Gutru exhibited a will to witness, made in his own favor, and told him, he, Gutru, had the whole matter in his own hands. Thus it is shown by the testimony Gutru is the sole beneficiary of a will executed by Ramstad on the occasion of his second meeting with him a few months before this suit was tried. From the testimony of Judge Mapes and of Gutru we are convinced the solicitude of the latter for the welfare of his recently acquired ward, the lone and childless relic of 80 years, is not inspired solely by high resolve and disinterested motive, but is in part at least the outgrowth of a sordid desire for gain. His conduct, as disclosed by his own testimony, tends to establish defendant's allegation of an attempt to defraud him of his title.

On the part of the defendant many witnesses were produced who testified with reference to Ramstad's mental condition. Their acquaintance with him for the most part covered a period of 25 years and over. Among these were merchants with whom he had done business for many years, many farmer neighbors, and a banker, with whom

he had kept a bank account. They seem to agree he was for the time embraced in the petition as well equipped to carry on his business affairs as the average citizen in the community. Upon the question of Ramstad's mental competency, we conclude, after a careful examination of the testimony, the plaintiff has failed to establish the material allegations of his petition. The proof shows he seemed to be eccentric in manner and odd in expression, due in part no doubt to the fact he retained some of the customs and much of the language of his native land. Ramstad is not shown by the proof to have been "mentally incompetent to transact business," but, on the contrary, it affirmatively appears from the testimony a fair success has attended upon his modest business ventures.

Testimony was introduced by both parties with reference to the quality and the value of the land involved in this action at the time the conveyances were executed and delivered. On direct examination one of plaintiff's witnesses testified it was then worth \$17 or \$20 an acre, but on cross-examination he says he was then but a boy, and did not know the price of land there, nor of any being sold in that vicinity, nor the value of the land in question at that time. Another witness on the part of plaintiff on the direct examination fixed the value at \$10 an acre, but on cross-examination fixed it at about \$7 or \$8 if sold for part cash and partly on time. From a careful examination of all the testimony upon this feature we find the land was for the most part low and wet, and at the time indicated was worth from \$5 to \$7 an acre.

The proof fails to sustain the plaintiff's allegations of fraud practised upon Ramstad by the defendant in effecting the execution and delivery of the instruments forming the basis of this action. The defendant testified in substance that Ramstad in January, 1887, told him he was about to lose his land, and proposed if witness would pay his debts and give him a little money to live on until some revenue could be derived from the rent of the land he would convey it to defendant, but wanted to retain a

life estate therein, to which defendant testifies he agreed after some reflection, and the said instruments were then executed and delivered. He testifies he gave to Ramstad from time to time money to live on in pursuance of said agreement of purchase in the total sum of about \$100, which with the incumbrances on the said land assumed and paid by defendant amounted in all to about \$600; that he gave to Ramstad the "life lease" of said land in May, 1896; that the said land was mostly low and wet, with some gumbo, and no sale for land there in 1887 that he can recall. Defendant's testimony on this point is corroborated by several witnesses who testify that Ramstad told them at the time, or shortly after the execution of the deed and assignment, in substance, that he was about to lose his land because of the debts against it, and that he sold it to the defendant, who assumed his debts. By witnesses who testified with reference to a later date it is shown that Ramstad told them he obtained a "life lease" from defendant in 1896 to assure his possession in the event of defendant's death. There is not much dispute in the record concerning the incumbrances paid off by the defendant upon the land, the plaintiff alleging they were "not in excess of \$180." From the proof we conclude the defendant paid a valuable consideration for the land and the transaction was in no sense a gift nor tainted by fraud, as pleaded and argued by plaintiff, nor is there any proof in the record of the abuse by defendant of alleged relations of trust and confidence existing between defendant and Ramstad.

The defendant pleads the statute of limitations as another defense, relying upon sections 7, 12 and 17 of the code, but it is unnecessary to consider this point, because upon the merits the controversy is resolved in favor of the defendant.

The decree of the district court is right and is in all things

AFFIRMED.

ARTHUR WILSON ET AL., APPELLANTS, v. BARTUS WILSON
ET AL., APPELLEES.*

FILED FEBRUARY 20, 1909. No. 15,422.

1. **Witnesses: COMPETENCY.** A party claiming title under a deed made by a deceased person is an incompetent witness to prove the delivery of such deed.
2. **Deeds: EXECUTION: EVIDENCE.** Proof of an unacknowledged deed made by a subscribing witness, as provided by section 10807, Ann. St. 1907, entitles such deed to record, and is presumptive of its due execution.
3. **Homestead: CONVEYANCE: VALIDITY.** The sole deed of a married man conveying his homestead and other lands is void as to the homestead estate, but valid as to the lands in excess of the homestead.

APPEAL from the district court for Sarpy county: WILLIAM A. REDICK, JUDGE. *Affirmed.*

J. K. Van Demark, C. S. Allen and L. E. Gruver, for appellants.

H. Z. Wedgwood and Hall & Stout, contra.

DUFFIE, C.

On the 6th day of May, 1891, Charles Wilson was the owner of a farm of 120 contiguous acres of land, upon which he resided with his wife, Maria. On that day he signed a deed purporting to convey the said farm to the defendant Bartus Wilson. The wife, Maria, did not join in this deed, nor was it acknowledged by Charles Wilson. He continued to reside on the premises until 1893, when he died intestate, leaving surviving him, his widow, Maria, and his five sons and heirs at law, the plaintiffs, Arthur, Thomas, Charles and James, and the defendant, Bartus Wilson. The widow continued to reside on the premises with the defendant Bartus, except one season, when the land was farmed by Arthur, until her death in 1904. After

* Rehearing allowed. See opinion, 85 Neb. —.

the death of the mother the plaintiffs brought this suit, each claiming an undivided one-fifth interest in the premises, and praying a partition thereof. The defendant Bartus Wilson answered, claiming ownership by the deed above mentioned, as well as by adverse possession of the premises for more than ten years. The issue of adverse possession was upon application of the defendant submitted to the jury, who found for the plaintiffs. On the trial the parties stipulated that the dwelling house and improvements were situated on the southwest quarter of the southeast quarter of the land in dispute, and that this 40 acres, together with the buildings, was worth the sum of \$2,000 on May 6, 1891, the date of the deed, and on June 7, 1893, the date of Charles Wilson's decease, and that, in event the deed was sustained as to the land in excess of Wilson's homestead interest, the southwest quarter of the southeast quarter might be treated as the portion which would be set off as the homestead interest if application had been made therefor. The court entered a decree of partition as to this 40 acres, quieting title in the defendant to the remaining 80 acres. The plaintiffs appeal.

The only direct evidence of the actual delivery of the deed under which the defendant claims was his own testimony that the instrument was in his possession before his father's death. This statement was received over the objection that, under the provisions of section 329 of the code, the witness was incompetent to testify to the transaction between himself and his deceased father. The word "transaction," as used in this section, embraces every variety of affairs, the subject of negotiations, actions, or contracts between the parties. *Smith v. Perry*, 52 Neb. 738; *Kroh v. Heins*, 48 Neb. 691. If the statement of the witness be taken as not implying a delivery, then it has no more force than the fact of possession at the beginning of the suit. If it implies an actual delivery, it is incompetent. *Russell v. Estate of Close*, 79 Neb. 318. There being no competent evidence of the actual delivery of the deed from Charles Wilson to the defendant Bartus Wil-

son, there is no direct evidence to support a finding that such deed was delivered so as to take effect during the lifetime of the grantor, and, unless the possession of such deed by the grantee therein named, raises a presumption of such delivery, the defendant has failed in establishing title to any of the land. It is a general rule that a presumption of delivery arises from the possession by a party claiming under a writing duly executed, and it is conceded that, had the deed in question been properly acknowledged, a presumption of delivery would have arisen from the fact of its possession by the said grantee, in the absence of any opposing circumstances; but it is insisted that this presumption does not obtain where the deed is not acknowledged, and that, if it would otherwise have arisen, it is overcome by the circumstances of the defendant being so situated as to naturally come into possession of the papers of Charles Wilson upon his death.

We do not think this contention can be sustained. Indorsed on the back of the deed we find the following: "State of Nebraska, Sarpy County, ss.: Be it known that on this 9th day of November, A. D. 1901, before me, a notary public, in and for said county of Sarpy, in the state of Nebraska, personally appeared Maria Wilson, who is personally known to me to be the identical person whose name is affixed to the within deed as witness to said deed, who being duly sworn according to law doth depose and say that her place of residence is in the county of Sarpy, state of Nebraska, that she set her name to the within deed as a witness to said deed, that she, said Maria Wilson, was personally acquainted with the grantor, and that she saw him sign the deed conveying certain lands unto Bartus Wilson; further, that she was fully acquainted with all of the conditions and terms of the within deed, and that said Charles Wilson did make said conveyance of his own voluntary free will, and that said Charles Wilson did receive value in full from the within named Bartus Wilson for the lands described in the within deed. (Signed) Maria Wilson. State of Nebraska,

Sarpy County: Personally appeared before me, Louis Bates, a notary public, in and for Sarpy county, Maria Wilson, who is personally known to me as the identical person, who did affix her signature to the above affidavit. Subscribed and sworn to in my presence this 9th day of November, 1901. Louis A. Bates, Notary Public, (My commission expires April 9, 1904.)" The above is apparently in strict compliance with section 10807, Ann. St. 1907, which provides: "If the grantor die before acknowledgment, * * * proof of the execution and delivery of the deed may be made by any competent subscribing witness thereto before any officer authorized to take the acknowledgment; and the witness must state, upon oath, his own place of residence, that he set his name to the deed as a witness, that he knew the grantor in such deed, and saw him sign or heard him acknowledge he had signed the same; and such proof shall not be taken unless the officer is personally acquainted with such subscribing witness, or has satisfactory evidence that he is the same person who was a subscribing witness to such deed." A somewhat similar statute was in force for many years in the state of New York, and, so far as the decisions from that state inform us, the subscribing witness was not formerly required to give his place of residence; but upon a revision of the statutes of that state the commissioners, in order that parties interested should have a means of identifying the witness aside from his mere name, recommended that the statute be so amended as to require the residence of the subscribing witness to be embodied in the affidavit made, and this recommendation was adopted and the statute so amended. *Irving v. Campbell*, 121 N. Y. 353. The statute relating to the proof of the deed by a subscribing witness being fully complied with and possession by the grantee being shown, the question of its execution and delivery is taken out of the case.

The plaintiffs further assert that, as the deed in question included the homestead of their father, and the same was not signed by their mother and acknowledged as re-

Wilson v. Wilson.

quired by our homestead statute, it was void in toto, and conveyed no title to any of the land therein described. Thompson, Homesteads and Exemptions, secs. 476, 477, announces the rule adopted by a great majority of the courts that a deed or mortgage executed by the husband alone, which conveys the homestead and other property, is void only as to the homestead estate, and operates as a good conveyance of property in excess of the homestead. This is the view seemingly taken by this court in *Whitlock v. Gosson*, 35 Neb. 829. On page 834 of the opinion it is said: "The decree of foreclosure is defended by counsel for appellee on the ground that the property in question exceeds \$2,000 in value, and that the mortgage is valid as to the excess over and above that amount. The value of the homestead is, we think, under the issues in this case wholly immaterial. It is not doubted that in a proper proceeding the homestead property in excess of the statutory limit may be subjected to the satisfaction of a mortgage by the husband. But if such relief is sought it should be by pleadings which put in issue the value of the homestead. The case of *Swift v. Dewey*, 20 Neb. 107, was in a proceeding in the nature of a creditor's bill and is therefore not in point." See, also, *McCreery v. Schaffer*, 26 Neb. 173, and *Teske v. Dittberner*, 70 Neb. 544.

While the pleadings in the case at bar do not seek to have the homestead segregated and set apart, the parties by the stipulation above referred to have obviated the necessity of such a proceeding. We recommend an affirmance of the judgment of the district court.

EPPERSON and GOOD, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

**WILLIS CADWELL, APPELLEE, V. MARGARET C. SMITH ET AL.,
APPELLANTS.**

FILED FEBRUARY 20, 1909. No. 15,446.

1. **Vendor and Purchaser: CONTRACT: CONSTRUCTION.** The parties to a contract for the sale of real estate stipulated that the balance of the consideration should be paid by a day named, in default of which the vendee was to forfeit his interest in the land. *Held*, That this provision manifested an intention to make time of the essence of the contract.
2. **Contracts: WAIVER.** Where both parties to a contract fail to perform their mutual covenants on the day named, they will be held to have waived its strict performance as to time, but the contract will remain unimpaired as to its effect.
3. ———: **FORFEITURE.** One party to a contract cannot declare a forfeiture for failure of the other party to strictly perform its conditions, unless he is in position to perform on his part.

APPEAL from the district court for Custer county:
BRUNO O. HOSTETLER, JUDGE. *Affirmed.*

Sullivan & Squires, for appellants.

N. T. Gadd, C. L. Gutterson and Flansburg & Williams,
contra.

DUFFIE, C.

On June 10, 1905, the parties to this action executed the following written contract: "For and in consideration of the sum of one hundred dollars to me in hand paid, I hereby give Willis Cadwell, of Broken Bow, the right to sell my farm, to wit, the west half of the north-west quarter and the southwest quarter of section fifteen, and the north half of the northwest quarter of section twenty-two, all in township seventeen north, range nineteen west 6th P. M., Custer county, Nebraska, for the sum of five thousand dollars, net, to me, as follows, to wit: One hundred dollars in hand paid, the receipt of which is hereby acknowledged. The sum of four hundred dollars June 12, 1905, the sum of thirty-five hundred

Cadwell v. Smith.

dollars January 1, 1906, without interest. The purchaser to assume a certain mortgage for the sum of one thousand dollars, with interest at nine per cent. from the 1st day of March, 1905, the purchaser to receive one-third of all crops raised during the season of 1905. Possession to be given January 1, 1906, at time final payment is made on purchase price. All improvements including buildings, fences, windmill, tower, tanks, all loose lumber, posts, or other material to remain on place, abstract to be furnished showing land to be clear of all incumbrance except said mortgage for the sum of one thousand dollars, and taxes up to and including the year 1904 paid. M. C. & S. P. Smith, M. C. Smith. Witness to signature of S. P. Smith: J. G. Painter."

Cadwell paid to the Smiths \$100 on the date of the contract, and \$400 on June 12, 1905, as by the contract required. June 2, 1906, at the request of the Smiths, a further contract was executed by the parties, as follows: "The deed and abstract herewith affecting the W. $\frac{1}{4}$ N. W. $\frac{1}{4}$, the S. W. $\frac{1}{4}$, sec. 15, and N. $\frac{1}{4}$ N. W. $\frac{1}{4}$, sec. 22, all in twp. 17-19, is held in escrow on following conditions, to wit: Whereas, Willis Cadwell, party of the first part, has purchased the above described property from Margaret C. and S. P. Smith for the sum of \$5,000, and there remains due said Margaret C. and S. P. Smith the sum of three thousand no-100 dollars; now, therefore, if said Willis Cadwell shall well and truly pay to said M. C. and S. P. Smith the said sum of three thousand and no-100 dollars with interest at six per cent. on the 1st day of September, 1906, then the deed and abstract is to be delivered to said Cadwell. Provided, should said Cadwell fail to pay said sum and interest for thirty days after due, then and in that event the deed and abstract shall be delivered to said M. C. and S. P. Smith, and any interest said Cadwell may have acquired by reason of any moneys paid shall be forfeited to said M. C. and S. P. Smith. Dated this 2 day of January, A. D. 1906. Willis Cadwell, M. C. Smith S. P. Smith."

While the agreement of June 10, 1905, is on its face more in the nature of an option than a contract of sale, it would seem from the evidence that the construction put upon it by the parties was that it operated as a sale of the land to the plaintiff. Both the plaintiff and defendants testified that rent was paid to the plaintiff for the use of the premises during the season of 1905, which would indicate that Cadwell was given possession of the land, and that defendants occupied the same as his tenants. In explanation of the contract made January 2, 1906, the plaintiff testified that the contract of June, 1905, was not carried out by him and the balance of the purchase price of the land paid, for the reason that during the latter part of 1905 Smith had several talks with him concerning their deal and was undecided whether he would stay in Custer county, move back to Missouri, or go to South Dakota; and, owing to the fact that there was a second mortgage for \$800 on the land, which he would have to pay out of the balance of the money due January 1, 1906, he desired to change the contract, taking only \$500 in cash, instead of the \$3,500 due, and to lease the land for another year, allowing the \$3,000 then remaining unpaid to run until the 1st of September, 1906. The impression which we get from the plaintiff's testimony, which is not disputed upon this point, is that Smith's wife, who held the legal title, desired to realize \$3,000 in cash from the land, and that her husband should remain upon it as tenant until they accumulated sufficient to discharge the second mortgage of \$800. Plaintiff complied with this request, the contract of January 2, 1906, was executed, the deed of the land placed in escrow to be held by the Broken Bow State Bank, and a lease running to Smith for 1906 executed and delivered. Some time after the middle of September, 1906, the plaintiff went with other parties to the state of Texas, and on the 27th of September wrote to S. P. Smith that one of the party had been taken sick at San Antonio, on account of which he had to leave another man with him and proceed alone

to other points in the state; that he would be unable to return to Broken Bow before some time in the succeeding week, at which time he would pay the balance due on the land, as well as any extra interest which Smith should incur by reason of the delay; that if this was not satisfactory to write him at a named point in Kansas, or to wire him as the case might require. This letter was not received by Smith until the 1st day of October, and after banking hours on that date he called on the bank for the surrender of the deed, and on the plaintiff's return home on the 6th or 7th of October, defendants refused to carry out the contract and make a conveyance. Plaintiff thereupon brought this action to enforce specific performance of the contract. From a decree in favor of the plaintiff, defendants have appealed.

The defendants insist that time was of the essence of the contract, and that payment of the \$3,000 not being made or tendered on the 1st day of October, 1906, they had a right under the contract to declare the same at an end and to be relieved of any further obligations thereunder. The second contract required Cadwell to pay \$3,000 on or before October 1, 1906, and provided for a forfeiture of his interest in the land in case of his default. This provision, we think, must be construed as making time of the essence of the contract. *White v. Atlas Lumber Co.*, 49 Neb. 82. That time may be made of the essence of a contract by stipulation of parties to that effect is not to be questioned. *Morgan v. Bergen*, 3 Neb. 209; *Jewett v. Black*, 60 Neb. 173.

It is equally well settled that a party to such a contract, who is himself in default, is not entitled to the aid of a court of equity to enforce the contract against a party who was ready and willing to perform according to the terms of the agreement. The record makes it clear that the plaintiff did not tender performance on his part on the 1st of October, 1906, and, unless there are circumstances attending the case which take it out of the general rule, the court cannot afford him any relief. On the

other hand, if the defendants were themselves in default, if they were not in position to perform on their part, equity will not allow them to declare a forfeiture and to take the benefit of the payments made them by the plaintiff. "As a general rule, a contract cannot be determined or rescinded by a party to it for nonperformance of the other party, unless the former is in a position to demand a specific performance." *Hale v. Cravener*, 128 Ill. 408. Where both parties fail to perform their mutual covenants on the day named, they will be held to have waived strict performance of the contract as to time, though it will be unimpaired as to its effect. *Van Campen v. Knight*, 63 Barb. (N. Y.) 205. As we have seen, both parties construed the contract of June 10 as one of sale, and that contract provides that the defendants shall furnish an abstract showing the land clear of all incumbrances except the \$1,000 mortgage, the payment of which the plaintiff assumed.

It is insisted by the defendants that after the January contract was executed an abstract of the land was examined by the plaintiff, and by agreement of the parties it was provided that the abstract should remain in the hands of the abstracter until the land was paid for, at which time it should be delivered to the plaintiff. We do not think that this claim is supported by the evidence. One Leonard, who prepared the abstract, testified that Cadwell and Smith came to his office about the time the second contract was made; that Cadwell took and examined the abstract, then handed it to Smith, "and said something about wanting an extension of it, and they said they would just leave it there." This evidence falls far short of establishing an agreement upon the part of the plaintiff to leave the abstract in the hands of Leonard until after the last payment was made. On the contrary, it shows that the plaintiff desired to have the abstract extended, and this could not be done to show an unincumbered title in Mrs. Smith (excepting the \$1,000 mortgage)

Cadwell v. Smith.

until payment of the second mortgage for \$800 and a release thereof.

It is true that Smith testified that it was the understanding that the \$800 mortgage was to be paid out of the \$3,000 which plaintiff was to pay on October 1. This mortgage was given to the president of the Broken Bow State Bank, who resided in the state of Illinois, and the evidence shows that at Smith's request the cashier of the bank had procured a release of the mortgage from the president, and had it in his possession ready for filing when the mortgage was paid. The plaintiff denies that he had any knowledge that a release had been secured from the mortgagee, or that there was any agreement with Smith that it should be paid from the \$3,000 due from him under the contract. On the contrary, his testimony shows that the defendants desired to save intact the \$3,000 due from him, and pay the \$800 mortgage from moneys derived from other sources. The plaintiff was not required to pay the \$3,000 due October 1, 1906, nor any part thereof, until the defendants were prepared to convey a title wholly unincumbered, except by the \$1,000 mortgage which he had assumed. Until the defendants were so prepared, the plaintiff was not in default. One party to a contract cannot declare a forfeiture for failure of the other party to strictly perform its conditions, unless he is in position to himself meet the conditions required on his part. He cannot penalize the other party while himself unable to perform. It is quite evident that the district court found that the defendants were not themselves in position to carry out this contract on the 1st of October, when the money from the plaintiff was due, and that upon that ground he entered a decree in favor of the plaintiff.

A careful examination of the evidence satisfies us that the finding of the district court is fully supported by the evidence, that his decree is right, and that the judgment appealed from should be affirmed.

EPPERSON and Good, CC., concur.

Gates v. Tebbetts.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

**HENRY B. GATES, APPELLEE, v. CHARLES E. TEBBETTS,
APPELLANT.**

FILED FEBRUARY 20, 1909. No. 15,453.

1. **Judgment: CONSTRUCTIVE SERVICE: RES JUDICATA.** A court has no jurisdiction to enter a personal judgment against a nonresident constructively served, who has made no appearance in the action; nor can any finding made in the case touching his personal liability operate as an estoppel so as to prevent him from showing to the contrary in a personal action subsequently brought against him.
2. **Principal and Surety: RELEASE.** A surety upon a contract is not released because the plaintiff in an action thereon fails to inform the court that another party to the contract is the principal debtor.
3. ———: ———. While it is a general rule that a discharge of the principal releases the surety, an exception to the rule exists when one becomes surety for a married woman, minor, or other person incapable of contracting.

APPEAL from the district court for Gage county: WILLIAM H. KELLIGAR, JUDGE. *Reversed.*

Hazlett & Jack, for appellant.

E. O. Kretsinger, contra.

DUFFIE, C.

In 1900 the plaintiff commenced an action to foreclose a mortgage made by Ella F. Tebbetts and Charles E. Tebbetts, at that time wife and husband. The mortgage secured a note made by the parties for \$1,300, and covered certain lots in the city of Beatrice, Gage county, Nebraska. Charles E. Tebbetts, the defendant in this action, was residing at Kansas City, and substituted service of sum-

mons was had on him in the state of Missouri. Ella F. Tebbetts, the wife, was personally served in this state, and she filed an answer, alleging that at the time of making the mortgage she was a married woman residing with her husband, and that at no time did she ever bind her separate estate, trade or business, and signed the note secured by the mortgage as surety for her husband, and had received no money for which the note was given.

Charles E. Tebbetts made no appearance in the action, except to object to the jurisdiction of the court over his person upon the service first made on him. This motion was sustained, after which a second service was had upon the defendant, and, no appearance being made by or for him, he was then defaulted. In February, 1901, the case was tried. The court found that there was due upon the note to secure which the mortgage was given the sum of \$1,455.98; that Ella F. Tebbetts was a married woman at the time of the execution of the note and mortgage, and that she was not liable thereon except to the extent of the mortgaged property described in the petition; that, after the mortgaged property had been exhausted and the proceeds applied in payment of the note and mortgage, "the said Ella F. Tebbetts will not be liable to the plaintiff for any deficiency judgment." There was a further finding that the decree draw interest at the rate of 10 per cent. per annum. A foreclosure of the mortgage was decreed, an order of sale issued, the mortgaged property duly advertised and sold to the plaintiff herein for \$740. December 17, 1901, the sale was duly confirmed by the court, and a finding made that there was a deficiency of \$884.23. May 2, 1902, the plaintiff applied for and obtained leave of court to bring an action at law against Charles E. Tebbetts for the deficiency arising in the foreclosure proceedings, and this action for that purpose was commenced in October, 1903. To a petition reciting the above facts the defendant filed an answer which is too lengthy to be incorporated in this opinion. From a judgment in favor of the plaintiff, the defendant has appealed.

The principal defenses urged upon this hearing are that Ella F. Tebbetts was the owner of the mortgaged property which was incumbered by mortgage liens when she purchased the same; that the plaintiff's mortgage was given in renewal of one of such mortgage liens; that defendant had no interest in the property, the same being the separate property of his wife, and that he signed the note secured by the mortgage as surety for his wife, and was bound thereon as surety only; that these facts were known to the plaintiff, who failed to present them to the court when the mortgage was foreclosed, and permitted and connived at the entry of a judgment in said foreclosure action relieving said Ella F. Tebbetts from all personal liability upon said note, for which reason he alleges that he is released from liability.

The second objection urged to the judgment is that it is excessive. It is familiar law that a court has no jurisdiction to enter a personal judgment against a nonresident of this state who has not appeared in the action, and where substituted service of the summons has been had. In the foreclosure case the court had no jurisdiction to enter a personal judgment against Charles E. Tebbetts, and did not attempt to do so. On confirming the sale made under the foreclosure decree, the court found the amount of the deficiency existing to be \$884.23, and on the trial of this case the district court apparently took the view that this finding was conclusive upon the defendant, and would not allow him to show that in the foreclosure proceedings an erroneous computation of the amount due upon the notes secured by the mortgage was made, and that the deficiency was not so great as found by the court. In the foreclosure proceedings the court had undoubted jurisdiction to ascertain the amount due upon the mortgage, to declare it a lien upon the mortgaged premises, and to order a sale for the satisfaction of the amount due. It is conceded that in that action the court was without power or jurisdiction to enter a personal judgment against the defendant, and the question now

before us is: Did the court have jurisdiction to find any fact going to establish the defendant's liability to a personal judgment and the amount thereof which the defendant is estopped from disputing in this action? We think not. On principle the law must be that, in a case where the court has no jurisdiction to enter a personal judgment against a defendant, it cannot conclude him by a finding of material facts necessary to establish his liability or the amount thereof in a subsequent action brought in a court having jurisdiction over his person. If, by an erroneous computation of interest or otherwise, the court in the foreclosure proceeding fixed the amount of the deficiency at too large a sum, the defendant in this action is not bound by such finding, but may have the benefit of any evidence in his possession tending to show the amount of the deficiency which actually exists, and for which he is personally liable. The district court erred in refusing him this privilege.

Relating to the claim that plaintiff in the foreclosure proceedings should have used diligence to establish the primary liability of Mrs. Tebbetts for the mortgaged debt, there is no evidence in the record that the plaintiff fraudulently confederated with Mrs. Tebbetts to obtain a decree relieving her of personal liability, and it is well settled that, while the general rule prevails that a discharge of a principal releases the surety, an exception to the rule is found where a person guarantees the obligation or becomes surety for a married woman, minor, or other person incapable of contracting. In such case, while the principal is discharged on account of his incapacity, the debt remains and its burden must be assumed by the surety. *Jones v. Crosthwaite*, 17 Ia. 393; *Winn v. Sanford*, 145 Mass. 302, 1 Am. St. Rep. 461. In the case last cited it is said: "Where one becomes a surety for the performance of a promise made by a person incompetent to contract, his contract is not purely accessorial, nor is his liability necessarily ascertained by determining whether the principal can be made liable. Fraud, deceit

in inducing the principal to make his promise, or illegality thereof, all of which would release the principal, would release the surety, as these affect the character of the debt; but incapacity of the principal party promising to make a legal contract, if understood by the parties, is the very defense on the part of the principal against which the surety assures the promisee. *Yale v. Wheelock*, 109 Mass. 502." The district court in the foreclosure proceeding believed and held that Mrs. Tebbetts was not liable upon the note which the mortgage secured, and it may well be that the plaintiff held the same view, and for this very reason requested the defendant to sign the note as surety for his wife. In any view of the case which can be assumed, we are not prepared to hold that a party bringing an action upon a contract signed by two parties, one of whom is surety for the other, releases the surety by a mere failure to inform the court of the relation of principal and surety which the parties defendant sustained to each other. The case is very different from *Wright v. Hake*, 38 Mich. 525, where the creditor secretly and fraudulently released the principal debtor from payment of the principal amount of the debt, and then sought to hold the surety for the whole claim.

For the error in holding that the defendant was estopped from questioning the amount of the deficiency in the foreclosure proceeding, and refusing to allow him to show that the amount claimed was in excess of that owing by him, we recommend a reversal of the judgment and remanding the cause for a second trial.

EPPELSON, GOOD and CALKINS, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded for a second trial.

REVERSED.

ADELLA M. KIRKPATRICK ET AL., APPELLEES, v. GEORGE W.
KIRKPATRICK, APPELLANT.

FILED FEBRUARY 20, 1909. No. 15,457.

1. **Appeal: HARMLESS ERROR.** Erroneous rulings of the court, which work no prejudice to the complaining party, do not call for a reversal of the judgment.
2. ———: **AFFIRMANCE.** Where the transcript of the record contains only the pleadings and record of the entry of judgment, which latter conforms to the pleadings, and in which no error appears, the judgment will be affirmed.

APPEAL from the district court for Custer county:
BRUNO O. HOSTETLER, JUDGE. *Affirmed.*

Aaron Wall and Hainer & Smith, for appellant.

Sullivan & Squires and A. P. Johnson, contra.

DUFFIE, C.

In February, 1904, plaintiff was granted a divorce from the defendant by the district court for Custer county, Nebraska. The court awarded the plaintiff custody of their three minor children, said children now being, respectively, 15, 10 and 5 years of age, but the decree made no provisions concerning their maintenance and support, and the plaintiff has had their custody and made provision for their support from the entry of the decree to the present time. In February, 1907, the plaintiff, for herself and as next friend of her children, commenced this action, reciting the facts above set out, and asking a decree requiring the defendant to pay her such amount as the court might find reasonable and proper for the support of her children until their majority. The trial resulted in a decree requiring the defendant to pay to the clerk of the court for the use of the plaintiff in the support and education of these minors \$180 a year, of which

Kirkpatrick v. Kirkpatrick.

sum \$90 should be paid semiannually upon the 25th day of October and April of each year until the children attained their majority, and that \$30 of said semiannual payments "shall be devoted to the support, maintenance, use and benefit of each of said minor children." From this decree the defendant has appealed.

Plaintiff, in her petition, alleged that no alimony was asked for or decreed to the plaintiff in the divorce proceeding; that the parties had settled and agreed upon a division of property outside of the court, but made no provision concerning the maintenance of their minor children. She further alleged that defendant has land in Custer county of the value of \$3,000, and personal property of the value of \$2,000; that she herself is the owner of a home in Broken Bow of the value of \$1,000, but which is incumbered to the extent of \$600, and that she owns a half section of land in Custer county worth \$7,000, but has no cash or money, and in order to support herself and children is compelled to take boarders, and is unable to properly provide for their maintenance and education. The defendant alleged that, when a division of the property was made between them, the maintenance and support of their children was considered, and the settlement and transfer of the property conveyed to the plaintiff was based in part upon the agreement and understanding that she should maintain and support the children without cost to him. In her petition plaintiff asked judgment against the defendant for the amount expended by her in supporting the children from the date of the divorce up to the time of bringing this action, as well as for contribution from him for their future support, and a motion to require her to separately state and number her several causes of action was overruled by the court, as was a demurrer to the petition for the reason that there was a misjoinder of parties plaintiff. A general demurrer to the petition based on the insufficiency of the facts stated to constitute a cause of action was also overruled, and an exception taken to each of such rulings.

As the court did not allow any recovery for the support of the children by the plaintiff prior to the commencement of the action, the defendant was not prejudiced by the action of the court in overruling his motion to require the plaintiff to separately state and number her causes of action, and, as a demurrer does not lie for the misjoinder of parties plaintiff, there was no error committed in overruling the demurrer based upon that ground. The general demurrer was properly overruled upon the authority of *Eldred v. Eldred*, 62 Neb. 613, in which it was held that a dissolution of the marriage relation does not relieve the father of the duty to support his minor children and will not defeat an action therefor.

Our statute relating to divorce (Ann. St. 1907, sec. 5338) gives the court where the action is pending authority to make such order concerning the care, custody and maintenance of the minor children of the parties as it shall deem just and proper, and the succeeding section authorizes the court from time to time afterwards, on the petition of either of the parents, to revise and alter such decree. It would probably be more regular to apply for a change or modification of the decree by filing the petition in the same action in which the divorce was granted, and not, as in the present case, to commence an independent proceeding; but this is a matter of procedure only, and, as the rights of the parties could not be injuriously affected, the decree entered in this case should not be reversed for such irregularity.

The defendant has not preserved the evidence given upon the trial, and has presented for our review nothing but a transcript of the pleadings and the decree entered. In such case it has been the uniform rule of this court to affirm the judgment of the district court if the pleadings supported the judgment entered. While it is true that the defendant alleges that the property transferred by him to his wife at the time of the divorce proceeding was based partly upon the consideration that she should maintain and support the children, the plaintiff denies

Taylor v. Austin.

that this was the case, and the court has determined that issue against the defendant. As the evidence taken on the trial is not before us, we must presume that such finding found support in the evidence offered by the parties. It being the rule of this court that a dissolution of the marriage does not relieve the father from the duty of supporting his children, unless the decree entered in the divorce proceeding relieves him of that duty, and the decree in the present case being silent upon that question, we have no other course to pursue, except to affirm the judgment of the district court.

We recommend that the judgment appealed from be affirmed, but with leave to the defendant to apply at any time hereafter for a modification of such judgment.

EPPELSON, GOOD and CALKINS, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is affirmed, but with leave to the defendant to apply at any time hereafter for a modification of such judgment.

AFFIRMED.

DEAN, J., having been of counsel in the cause, not sitting.

BARBARA TAYLOR, GUARDIAN, APPELLANT, v. E. AUSTIN
ET AL., APPELLEES.

FILED FEBRUARY 20, 1909. No. 15,482.

1. **Highways: ESTABLISHMENT: WIDTH.** A public highway regularly established by the county authorities under the law of 1866 (laws 1866, ch. 47, sec. 3) must be regarded as taking in land to the full width required by the statute defining the width of public highways, and the fact that the petition for the highway and the order establishing the same does not mention the width of the road is immaterial.
2. ———: ———: **NOTICE.** One who petitions for the establishment of a highway, as well also as his grantees, cannot complain

Taylor v. Austin.

that the notice provided by statute of the time when the petition will be presented to the county board was not given.

3. ———: TITLE BY PRESCRIPTION. A party cannot acquire prescriptive title to a public highway by possession and use of the ground included therein, however long continued.

APPEAL from the district court for Cass county: PAUL JESSEN, JUDGE. *Affirmed.*

John C. Watson, for appellant.

C. A. Rawls and W. C. Ramsey, contra.

DUFFIE, C.

E. Austin, road overseer of district 59, in Cass county, in December, 1906, served a written notice on the plaintiff that her fence was in the public highway running north and south on the half section line through section 25, township 10, range 13, in Cass county, Nebraska, and directing her to remove her fence to a line 33 feet west of said half section line. The notice further stated that, unless its terms were complied with on or before the 10th of January, 1907, the overseer would himself proceed to remove the fence. Shortly thereafter this action was commenced to enjoin the overseer and the county of Cass from interfering with the plaintiff's fence or from trespassing in any manner upon her premises. A temporary injunction was issued, which upon the trial was made perpetual as to a portion of plaintiff's land claimed by the county as a highway, and dissolved as to another part of plaintiff's land, which the court found to be within the boundary of a regularly established road. Plaintiff has appealed from so much of the decree as found a regularly laid out road over any part of the land in dispute.

It was stipulated on the trial that prior to the year 1869 a legal highway had been established along and near the half section line running north and south through the center of sections 24 and 25, township 10, range 13, in

Taylor v. Austin.

Cass county. In 1869 the owners of the land located along this half section line on both sides, and among whom was the grantor of plaintiff herein, filed a petition with the board of county commissioners asking that said road be changed so as to run on the half section line. The board allowed the petition and appointed one Dubois a special commissioner to view the proposed road and establish the same, if in his judgment the public good required it. Dubois reported under date of August 2, 1869, that after taking the oath required by law he proceeded to examine the line, and found that by locating the road on the half section line it would shorten the route as previously laid out and lessen the damage to private property, and that it could be made a good road. His report concludes as follows: "I do hereby vacate the old road as prayed for in the petition, and I do hereby establish the new route petitioned for as one of the county roads of Cass county." Accompanying this report was a plat showing the location of the old and vacated road and the new road which was established along the half section line. The old road ran north and south through sections 24 and 25 near the half section line, but lying principally west of said line. This report was filed with the county clerk on the 3d day of August, but no record appears to have been made.

It is the contention of the plaintiff that no highway has been established along the half section line through sections 24 and 25. The statute of 1867 (ch. 47, sec. 19) under which the county claims the highway in question was established required a notice to be posted on the courthouse door and at three other public places in the vicinity of the road sought to be located, changed, or discontinued, setting forth the time when application thereor would be made to the commissioners. There is nothing in the record before us showing that such notice was given in this case, but it is shown that the petition for the change was signed by 12 residents, who described themselves as owning the land on the half section line, and it

Taylor v. Austin.

was stipulated upon the trial that they were the owners of land adjoining upon the half section line, and that H. F. Taylor, one of the petitioners for the road, was grantor of the plaintiff in this action. That H. F. Taylor was not entitled to notice, being one of the petitioners for the road, is established by the holding in *Graham v. Flynn*, 21 Neb. 229, where it is said: "A petitioner for the location of a public road over his own land is not entitled to notice of the pendency of such petition. He is, in fact, a plaintiff in the proceeding, and where a petition signed by the requisite number of landholders has been acted upon by the proper authorities and a road located, a grantee of such petitioner cannot enjoin the use of the road upon the ground of want of notice to his grantor." Aside from the want of notice, the proceeding taken to establish the road in question appears to have been regular, and, as we have seen, the plaintiff cannot take advantage of the want of notice to her grantor, he being a petitioner for the road.

It is conceded that a portion of the land claimed as a highway has been inclosed by the plaintiff and her grantors for 20 years or more, and this fact, if the road had not been legally established, and the county was claiming only a prescriptive right, would entitle the plaintiff to hold the part so inclosed as her absolute property. While the width of the road was not designated in the petition therefor, nor in the report of the commissioners establishing the same, the statute at that time required that all public highways should be 66 feet in width, and, as this highway was regularly established and has been in use by the public since 1869, it must be conclusively presumed that it was established as a legal road 66 feet in width; and the fact that it has not been worked or used to its full width, and that some portion of it has been inclosed by the plaintiff, does not vest her with any title thereto, as title by prescription cannot be obtained to a public highway. *Krueger v. Jenkins*, 59 Neb. 641; *Lydick v. State*, 61 Neb. 309.

Mote v. Kleen.

The plaintiff's brief, while full and exhaustive, is based upon the theory that no legal highway has been established which included any part of the lands claimed by the plaintiff. If Cass county and the public made claim to this road, not as one legally established, but because of long usage, there is no doubt that, under the authorities cited in plaintiff's brief, the road, so far as the same has been inclosed for ten years or more, could not be claimed by the county.

The facts established leave the question beyond any doubt that the road is a statutory road and that the public are entitled to a use of its full width. We recommend an affirmance to the judgment appealed from.

EPPELSON, GOOD and CALKINS, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

ROOT, J., not sitting.

LAURA MOTE ET AL., APPELLANTS, V. BEN KLEEN ET AL.,
APPELLEES.

FILED FEBRUARY 20, 1909. No. 15,541.

Executors and Administrators: SALE OF LANDS: ESTOPPEL. Where the adult heirs of a deceased party, with knowledge of the facts, accept and retain, as a part of their distributive share of the estate of the deceased, money derived from a sale of real estate made by the administrator, they cannot thereafter maintain an action to set aside such sale on the ground that the land was a homestead and not liable to be sold for the debts or charges against the estate.

APPEAL from the district court for Franklin county:
ED L. ADAMS, JUDGE. *Affirmed.*

Dorsey & McGrew and Bernard McNeny, for appellants.

H. Whitmore and Samuel Rinaker, contra.

DUFFIE, C.

In December, 1893, Robert W. Sipes and his wife, Elvira, purchased the southwest quarter of section 20, township 3, range 14, in Franklin county, with the proceeds of other lands owned by them jointly. The land was purchased from Salvador Hayes, and he conveyed the north 80 acres to Mrs. Sipes and the south 80 acres to her husband, each taking title to a separate 80 acres. The house, barn, granary, well and cistern were located on the north 80 acres to which the wife held title. The south 80 acres was the better land, and all, or nearly all, in a state of cultivation. Sipes and his family moved onto the land in March, 1894, occupying the house and making use of the buildings and other improvements upon the north 80 acres. The south 80 acres was farmed in connection with the wife's land, and was the most productive, portions of the north 80 acres being quite rough, and about 30 acres thereof used as a pasture.

Sipes departed this life November 16, 1894, leaving as his heirs, his wife, Elvira, who has since intermarried and is now known as Elvira G. Whitmore, Ada B. Sipes, a minor daughter born of their marriage, also Laura Mote, Etta Blemler, Ida S. Smith and Luella Wright, daughters of Sipes by a former marriage. The plaintiffs Hugh and Glen Wright are children of Luella Wright, whose death occurred since that of her father. Sipes died intestate, and his widow was appointed administratrix of the estate, but after serving a year or more she resigned, going to the state of Illinois, and George E. Shepard was appointed administrator. Final settlement of the estate was delayed in consequence of foreclosure proceedings, which finally terminated in this court (*Orient Ins. Co. v. Hayes*, 61 Neb. 173), but the final report and discharge of the administrator appears to have taken place in 1901. During the course of the administration Shepard applied to the district court for license to sell the south half of

Mote v. Kleen.

the southwest quarter of said section 20, and after due notice and hearing he was authorized to and did sell the same to Elvira G. Whitmore, Sipes' former wife, and who held the principal claims against the estate, consisting of allowances made by the county court for the support of herself and family during the administration. She paid the administrator \$1,100 for the land, obtained a deed therefor, and afterwards conveyed the whole quarter to the defendant Ben Kleen. After paying the debts due from the estate there remained the sum of \$254, which the probate court ordered distributed among the heirs of Sipes. This distribution was made, and the receipts of all the children of Sipes by his first wife, acknowledging payment to them, are found in the bill of exceptions. This action is brought by the plaintiffs, Laura Mote, Etta Bemler and Ida Smith, surviving daughters of Robert W. Sipes, and Hugh and Glen Wright, the only children of a deceased daughter, their claim being that the south 80 acres of the southwest quarter of said section 20, to which the father held title, was his homestead; that the sale thereof by the administrator was absolutely void; and they asked that said sale and all conveyances and incumbrances placed thereon since the date of said sale may be set aside and held for naught.

It is conceded that the rights of the heirs of one who dies in possession of a homestead take precedence of the creditors, and that the sale of a homestead property for the payment of debts of the deceased is void. *Tindall v. Peterson*, 71 Neb. 160; *Bixby v. Jewell*, 72 Neb. 755; *Holmes v. Mason*, 80 Neb. 448.

The principal contention between the parties arises from the fact that Sipes and his family lived upon the north 80 acres to which the wife held title, that there were no buildings or improvements of any kind on the south 80 acres, except that the land had been broken and cultivated, and the defendants contend that by living upon the north 80 acres and using the pasture, the buildings and other appurtenances, Sipes had selected his

homestead out of his wife's property, and that her consent to such selection was manifest by the actual use made of the property. On the other hand, the plaintiffs contend that as the south 80 acres was the principal source of the family supplies, and was farmed in connection with the north 80 acres, it constituted the homestead of Robert W. Sipes, who was the head of the family. *Lowell v. Shannon*, 60 Ia. 713, *Mason v. Columbia Finance & Trust Co.*, 99 Ky. 117, 35 S. W. 115, and *Buckler v. Brown*, 101 Ky. 46, 39 S. W. 509, are relied on in support of the theory that a homestead may be claimed out of the husband's lands, although residing with his family in a house on adjacent land owned by his wife. Whether under our statute, which apparently requires the homestead to include "the dwelling house in which the claimant resides," a claim of homestead may be maintained to the south 80 acres under the circumstances of this case is a question that we do not care to discuss until it arises in such a way that it must be determined.

There is another view of the case which we also think quite decisive of the rights of the parties. The defendants have pleaded and assert that the plaintiffs are estopped from claiming any interest in the land of their ancestor because of having received and retained a part of the price for which it was sold. Due notice of the application to sell was given to all parties. The personal property belonging to the estate was wholly insufficient to pay the debts and the widow's allowance. Any sum remaining in the hands of the administrator when his final report was made was money derived from the sale of this land. With full knowledge of these facts the adult plaintiffs and the mother of the minor plaintiffs accepted from the administrator their distributive share of this money. Can they take their distributive share of the money arising from the sale of the land, and, while holding the same, ask to have the sale set aside and title to the land decreed in them? The legal principle involved was before the supreme court of Iowa in *Pursley v. Hays*, 17 Ia. 310, and

David Bradley & Co. v. Matley.

Deford v. Mercer, 24 Ia. 118. In these cases it was held that where heirs, after attaining their majority, with knowledge of the facts, and in the absence of fraud or mistake, receive and retain a portion of the money arising from the sale by their guardian of their interest in certain lands, they are thereby estopped from questioning the validity of such sale, and it is further held that this principle is not limited to cases of voidable sales, but extends to those where the sale is void. Judge Dillon, who wrote the opinion in the case last cited, furnished a note for the reporter which is found on pages 123 and 124 of the report, in which numerous cases are cited in support of the views adopted in that case. Believing that the opinion of Judge Dillon establishes a just and salutary principle, we are constrained to hold that the parties plaintiff, having received the benefit of the sale, are in no position to question its validity, and are estopped from so doing. To the same effect is *Staats v. Wilson*, 76 Neb. 204, and *Wamsley v. Crook*, 3 Neb. 344.

We recommend an affirmance of the decree appealed from.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

DAVID BRADLEY & COMPANY, APPELLANT, v. CHARLES E. MATLEY, APPELLEE.

FILED FEBRUARY 20, 1909. No. 15,458.

Judgment: COLLATERAL ATTACK. In this case, where a justice of the peace overruled a special appearance objecting to the jurisdiction over the person, an adequate remedy was given by error proceedings, and the ruling cannot be assailed collaterally.

APPEAL from the district court for Custer county:
BRUNO O. HOSTETLER, JUDGE. *Affirmed.*

Hainer & Smith, for appellant.

H. M. Sullivan and Mockett & Matley, contra.

EPPELSON, C.

On March 27, 1905, defendant obtained a judgment against plaintiff, a foreign corporation, in a justice of the peace court. The summons in that action was served upon said "David Bradley & Co., by delivering to W. D. Cocke, General Agent, a true and certified copy of the same." Upon the return day the plaintiff herein filed a special appearance objecting to the jurisdiction of the court over its person because no summons had been served upon it. This special appearance was supported by the affidavit of W. D. Cocke, who said that he was not the general or managing agent of said David Bradley & Company. The special appearance was overruled, but plaintiff herein made no further appearance before the justice of the peace, who entertained the cause and rendered judgment against the plaintiff herein. This action was brought to enjoin the collection of the judgment, which is alleged to be void because no summons had been served. The order of the justice of the peace in overruling the plaintiff's special appearance was an adjudication of the question of his jurisdiction over the person, and plaintiff had an adequate remedy at law by direct proceedings to reverse the judgment. We think that the plaintiff herein was at liberty to choose one only of two courses. It could appear before the justice of the peace by special appearance, or it could later collaterally attack the judgment rendered if the service of process was fatally defective. It voluntarily submitted the question of jurisdiction to the court. That court had the power to pass upon it, and its judgment was binding upon both the parties until reversed by an appellate court. The question is *res judi-*

McCullough v. Dunn.

oata, and we recommend that the judgment of the district court dismissing plaintiff's action be affirmed.

DUFFIE, GOOD and CALKINS, CC., concur.

By the Court: For the reasons given in the foregoing opinion, the judgment of the district court is

AFFIRMED.

DEAN, J., not sitting.

ASA D. MCCULLOUGH, APPELLEE, V. WILLIAM DUNN,
APPELLANT.

FILED FEBRUARY 20, 1909. No. 15,479.

1. **Sales: BREACH OF WARRANTY: PLEADING: VARIANCE.** In an action to recover on a warranty that a horse sold by defendant to plaintiff was sound, plaintiff alleged that the horse was suffering from a disease or defect of the back, the evidence indicating that the trouble was azoturia, a disease of the stomach, liver and kidneys. *Held*, Not such a variance as will require a reversal of a judgment in favor of the plaintiff, it not appearing that defendant was prejudiced by plaintiff's failure to allege azoturia as the horse's disease.
2. ———: ———: **EVIDENCE.** The testimony of a witness, otherwise admissible, who observed certain symptoms showing that a certain horse was diseased, although he was unable to identify it as the horse in controversy, is admissible in evidence, and will be permitted to stand in the record if the horse he observed is identified as the one in controversy by other witnesses.

APPEAL from the district court for Cass county: **PAUL JESSEN, JUDGE.** *Affirmed.*

Byron Clark and C. E. Tefft, for appellant.

Matthew Gering, contra.

EPPELSON, C.

Plaintiff sued to recover \$152.50 paid by him as the purchase price for a horse bought of defendant, who, it is

McCullough v. Dunn.

alleged, warranted the horse to be perfectly sound in every way and free from disease or defect. The facts, according to plaintiff's evidence, stated generally are as follows: At an auction sale, conducted by the defendant for himself, the horse in controversy was offered for sale. The plaintiff, desiring to buy, asked the defendant if the horse was sound; if he would work in harness. To which the defendant replied, "Yes, this horse is sound, and if he ain't right we will make him right," and "We are selling that horse under a guarantee. We guarantee everything but his age," and "Ace, you can't go wrong on him. I am selling him absolutely sound, and I will give a full guarantee." Defendant also handed the plaintiff a card, giving a description of the horse, and a memorandum of the sale, on which it is stated: "This horse is sold sound." A few hours after the sale, and after traveling but a few miles, the horse showed symptoms of disease, which rapidly developed, resulting in death four days later.

Veterinarians who testified at the trial seem to have agreed that the ailment of the horse was azoturia, which is a disease of the liver, kidneys and stomach. And it is contended that, as this fact is established with reasonable certainty, the allegations of the petition are not supported by the evidence, in that the petition alleges an affliction of the back. Under the circumstances of this case this variance is not such as would require a reversal of the judgment, nor a defeat of the plaintiff's petition. The disease testified to was the disease with which the horse died. It is not urged by the defendant that he is not liable because the horse had azoturia instead of an affliction of the back. The real question to be determined is whether or not the horse was sound when purchased by the plaintiff. Had the defendant only warranted that the horse had no affliction of the back, the defendant's present contention might well be considered. This disease was made apparent to the plaintiff by symptoms of a weak back. The plaintiff evidently alleged, as best he could, the trouble with the horse as he observed it.

A disinterested witness observed that a horse sold at the auction by the defendant "seemed to be affected in the back." He does not identify this as the horse purchased by the plaintiff, but the horse which he observed was by other witnesses identified as the one here in controversy. The introduction of his testimony is objected to, and also an instruction wherein the court told the jury that they should disregard the evidence of this witness unless they should find that the horse which he observed was the horse purchased by the plaintiff. It cannot be considered that this instruction made the jurors judges of the competency of the evidence. The instruction might as well not have been given, but it is surely not prejudicial to the defendant. Evidently the jury, in the absence of such an instruction, would have disregarded the witness' testimony, unless they were satisfied that it related to the horse in controversy.

Several other errors are assigned, all of which we have examined and, failing to find therein any prejudicial error, we recommend that the judgment be affirmed.

DUFFIE, GOOD and CALKINS, CC., concur.

By the Court: For the reasons given in the foregoing opinion, the judgment of the lower court is

AFFIRMED.

HARVEY M. DUVAL ET AL., APPELLEES, V. ADVANCE
THRESHER COMPANY, APPELLANT.*

FILED FEBRUARY 20, 1909. No. 15,464.

Judgment: PLEADINGS. In an action by an agent upon an agency and commission contract to recover commissions earned in selling merchandise to the amount of \$2,706, plaintiff had judgment for \$517.25. The contract was set out in the pleadings and showed that plaintiff's commission could not exceed 20 per cent. of the

*Rehearing allowed. See opinion, 85 Neb. —.

Duval v. Advance Thresher Co.

purchase price, and that the commission became due and payable only when the merchandise sold had been paid for in cash, and the pleadings also showed that but \$830.50 of the purchase price had been paid in cash. *Held*, That the judgment was not supported by the pleadings.

APPEAL from the district court for Keya Paha county:
JAMES J. HARRINGTON, JUDGE. *Reversed*.

Halleck F. Rose, W. B. Comstock and W. C. Brown, for appellant.

Duval & Amspoker and C. E. Lear, contra.

GOOD, C.

This action was brought to recover commissions earned by plaintiffs as agents for the defendant in the sale of machinery. Plaintiffs recovered judgment for \$517.25, and defendant has appealed.

In substance, the plaintiffs alleged that they became the agents of the defendant to sell machinery, and in the course of their employment they effected the sale of an engine, threshing machine and other items to the total amount of \$2,706, and that their commissions for making said sales amounted to the sum of \$504.05, and that defendant had failed and refused to allow said claims or to settle for or pay the same or any part thereof. Defendant admitted the employment of the plaintiffs as agents, and alleged that the contract of agency, which provided for commissions to be earned by plaintiffs, was in writing, and incorporated a copy thereof in its answer. Among other things, the contract provided: "In consideration for all services rendered or to be rendered of every kind and nature, the party of the first part, the Advance Thresher Company, agrees to pay to the second party, subject to all the provisions hereinafter set forth, a commission on orders taken by party of second part and which shall be filled, settled for, and delivered, when the goods are fully paid for in cash, or the notes representing pay-

ment are fully paid for in cash and according to the terms of this contract as follows, viz.: (a) On time sales of engines, separators, horse powers, feeders, husker-shredders, and other machinery manufactured by the Advance Thresher Company not herein specifically mentioned, all over and above eighty (80) per cent. of list price at factory for 1906." The defendant alleged that the sales upon which plaintiffs claimed a commission were sold at less than 80 per cent. of the list price, and that plaintiffs were therefore not entitled to any commission upon the articles sold. The defendant also alleged that the notes representing the purchase price of said machinery sold had not been paid, and for that reason no commission had as yet accrued to the plaintiffs. Plaintiffs in their reply admitted the making of the written contract as alleged by defendant, and alleged that said machinery had been sold at the list price, and that three instalments of the purchase price, amounting to the sum of \$830.50, had been paid. The district court directed a verdict for plaintiffs for the full amount sued for, and on the same day rendered judgment on the verdict. Defendant filed a motion for a new trial on the second day after the verdict was rendered, but the district court adjourned on the same day that verdict was rendered, so that the motion for a new trial was not filed at the same term that the judgment was rendered and cannot be considered.

The only question that can be determined upon this appeal is the sufficiency of the pleadings to support the judgment rendered. The written contract of agency was entered into on the 24th day of February, 1906. The sale of machinery on which commission is claimed is alleged to have been made and completed on the 31st day of July, 1906. By the terms of the contract it is apparent that the most that plaintiffs could be entitled to would be 20 per cent. of the purchase price of the machinery sold, but the contract further provides that no commission should become due until the machinery sold was fully paid for in cash, or the notes representing payment are

Van Buren v. Village of Elmwood.

fully paid in cash. By the allegations of plaintiffs' reply it appears that only \$830.50 of the amount of the purchase price had been paid. Whether this was paid previous to the commencement of the action is not disclosed. It is apparent that the utmost that plaintiffs would be entitled to at the time would be a commission of 20 per cent. upon the \$830.50, or the sum of \$166.10, together with interest thereon from the time the same became due. As the judgment rendered was for \$517.25, it thus appears that judgment was rendered for a sum greatly in excess of the amount that was shown to be due to the plaintiffs by the pleadings. It follows that the judgment rendered is not supported by the pleadings.

We recommend that the judgment of the district court be reversed and the cause remanded for further proceedings.

DUFFIE, EPPERSON and CALKINS, CC., concur.

By the Court: For the reasons given in the foregoing opinion, the judgment of the district court is

REVERSED.

PETER VAN BUREN, APPELLANT, v. VILLAGE OF ELMWOOD,
APPELLEE.

FILED FEBRUARY 20, 1909. No. 15,468.

Villages: VACATION OF STREETS: STATUTES: REPEAL. An act of the legislature entitled "An act to provide for vacating streets, alleys and public grounds in towns and villages" (laws 1871, p. 125), passed and approved March 10, 1871, in so far as said act confers upon county boards the power to vacate streets within incorporated villages, was repealed by the act of the legislature entitled "An act to provide for the organization, government, and powers of cities and villages" (laws 1879, p. 193), passed and approved March 1, 1879.

APPEAL from the district court for Cass county: PAUL JESSEN, JUDGE. *Affirmed.*

A. N. Sullivan, for appellant.

H. D. Travis, William Deles Dernier and Strode & Strode, contra.

GOOD, C.

Plaintiff, who is the owner of blocks 29 and 32 in the village of Elmwood, in Cass county, petitioned the board of county commissioners of said county to vacate the street lying between said blocks. The village of Elmwood appeared and filed written objections to the jurisdiction of the board of county commissioners to act in the matter, upon the ground that said village of Elmwood was a duly incorporated village, and the streets, alleys and public grounds of said village are solely under the jurisdiction of the board of trustees of said village, and the board of county commissioners was without power or jurisdiction to vacate streets or alleys of an incorporated village. The county board found that it was without jurisdiction to hear the matter and dismissed the application. Plaintiff thereupon duly excepted to the decision of the board and filed a petition in error to the district court for said county. The district court rendered judgment dismissing plaintiff's proceeding in error, for the reason that the county commissioners had no jurisdiction to hear and determine said matter. Plaintiff has appealed.

The plaintiff's application to the county board to vacate the street was based upon the provisions of an act of the legislature of 1871, entitled "An act to provide for vacating streets, alleys and public grounds in towns and villages." Laws 1871, p. 125. This act is carried into the Annotated Statutes, 1907, as section 9015 to 9018, inclusive. Section 9015 authorizes persons desiring to have any street in a village vacated to give notice of his application to the county commissioners for the vacation of such street. Section 9016 authorized the county commissioners to appoint persons to examine such street and report at the next meeting of the board whether any injus-

tice or any inconvenience would be worked by the vacation of such street. The board, upon such report and other testimony presented by the applicant, or others opposing the vacation, is authorized to decide for or against vacation of the street. By section 9017 the board, if convinced that no injustice would be worked by such vacation, is required to order such vacation. It is conceded that, if this act is in full force, the county board was vested with jurisdiction to hear and determine the application. Defendant contends, however, that the act of 1871 was repealed in 1873 by an act of the legislature entitled "An act relating to incorporated towns and villages." This latter act is found in chapter 81 of the General Statutes of 1873. Section 7 thereof provides, among other things, that the board of trustees of each incorporated village or town shall have the power to have the streets opened, cleaned and repaired. Section 29 of the act provides for the repeal of "chapter 53 of the Revised Statutes entitled 'towns,' and all other acts and parts of acts inconsistent therewith." An examination of this act does not disclose that the power to vacate streets was given or attempted to be given to the village trustees, nor do we perceive that the act of 1873 was in conflict with the act of 1871, so that the repealing clause contained in section 27 of the act of 1873 would not operate to repeal the act of 1871. In 1879, however, the legislature passed an act "to provide for the organization, government, and powers of cities and villages." Laws 1879, p. 193. In addition to other powers granted to cities and villages, section 69 authorized cities and villages under the provisions of the act to enact ordinances or by-laws for the following purposes: "Subdivision XXVII. To open, widen or otherwise improve or vacate any street, avenue, alley, or lane within the limits of the city or village, and also to create, open and improve any new street, avenue, alley, or lane." Section 117 of this act provided for the repeal of certain specific acts, and also for the repeal of all acts and parts of acts inconsistent with the provisions of said act.

Fink v. Busch.

The plaintiff contends that the power to vacate streets which was given to the county board by the act of 1871 was to be exercised only for the benefit of the private owner, and when no person was injured by such vacation, and that the power to grant relief under these circumstances was not given to the village board of trustees by the act of 1879. We are unable to concur in this view. The power to vacate streets which was granted to the village board of trustees by the act of 1879 is not limited or circumscribed. Its power to vacate streets is full and ample, and reaches to every possible case where a village street might properly be vacated. We think the act of 1879 is clearly in conflict with the act of 1871, and that the repealing clause contained in section 117 of the act of 1879 operated as a repeal of the act of 1871 in so far as it conferred upon county boards the power to vacate streets in incorporated villages, and thereby deprived county boards of jurisdiction to vacate such streets.

The county board properly sustained the objection to jurisdiction and dismissed the application to vacate the street, and the judgment of the district court sustaining the action of the county board was right, and should be affirmed.

DUFFIE, EPPERSON and CALKINS, CC., concur.

By the Court: For the reasons given in the foregoing opinion, the judgment of the district court is

AFFIRMED.

HENRY FINK, APPELLEE, v. JOHN BUSCH, APPELLANT.

FILED FEBRUARY 20, 1909. No. 15,489.

1. **Assault and Battery:** PETITION. A petition which contains averments to the effect that defendant wilfully and maliciously, with force and violence, pushed and shoved plaintiff across a room to a door and out of the door to the ground, a distance of six feet,

Fink v. Busch.

and that as a result plaintiff's leg was broken and his knee crushed, and to his damage in the sum of \$5,000, states a cause of action for damages for assault and battery.

2. ———: JUSTIFICATION: INSTRUCTIONS. In an action to recover damages for assault and battery, it is not proper for the trial court to submit to the jury the defense of justification, when such defense is neither alleged nor proved.
3. Damages: INSTRUCTIONS. An instruction which directs the jury that, if they find for plaintiff, to assess his damages in any sum, not exceeding the amount claimed, which they may find will compensate him for the injuries received, is not prejudicially erroneous, if from other parts of the court's charge to the jury it appears that the jury were to ascertain the amount of plaintiff's recovery from the evidence.
4. ———: PLEADING. Physical pain and mental anguish are proper elements of damage in an action for personal injuries, and need not be specially alleged in the pleading, where the injury complained of is such as to necessarily import physical pain and mental anguish.
5. Trial: INSTRUCTIONS. It is not error for the trial court to refuse to submit to the consideration of the jury a defense which finds no support in the evidence.
6. Appeal: VERDICT: EVIDENCE. A verdict based upon conflicting evidence will not on appeal be set aside, even though the appellate court might from the evidence have arrived at a different conclusion from that reached by the jury.

APPEAL from the district court for Douglas county:
LEE S. ESTELLE, JUDGE. *Affirmed.*

John M. Macfarland and W. F. Wappich, for appellant.

George A. Magney, for appellee.

GOOD, C.

Plaintiff brought this action against John Busch and the Title Guaranty & Trust Company to recover damages for personal injuries inflicted upon plaintiff by the defendant Busch. Plaintiff dismissed his action as to the Title Guaranty & Trust Company, and on the trial recovered a judgment against the defendant Busch, who has appealed to this court.

In his petition the plaintiff alleged that defendant Busch was a licensed retail dealer in intoxicating liquors in the city of Omaha, and as such dealer had given a bond of \$5,000 with the Title Guaranty & Trust Company as surety, which was duly approved by the proper authorities; that a copy of said bond was attached to the petition as an exhibit; that plaintiff entered defendant's saloon, and after drinking several glasses of beer became somewhat intoxicated and noisy, and while in that condition he said to the defendant: "If he was running a saloon in a respectable and lawful manner he would not be having women drinking in a wine-room therein"; that thereupon the defendant became angry, and ran from the bar to where plaintiff was and violently pushed and shoved him across the room and out of the rear door and down a flight of steps to the ground; that as a result his right leg was broken and knee crushed, and that the injured leg would always be shorter than the other and the knee stiff, that the only provocation given the defendant was the remark about women in the wine-room; "that said act of throwing the plaintiff out of the rear door and injuring him, as above described, was done wilfully, maliciously and unlawfully, without just cause or provocation"; that plaintiff had been compelled to employ a physician and surgeon at great expense; that he would not be able to do work of any kind for several months and would never again be able to perform manual labor or work at his trade as a tinner. The copy of the bond was not in fact attached to the petition. Defendant Busch admitted that he was a licensed liquor dealer, alleged that plaintiff's injuries were the result of his own carelessness and were not caused by the carelessness or negligence of the defendant, and denied all other allegations of the petition. In his reply the plaintiff denied all the allegations of the answer.

The defendant contends that the action was to recover damages under the Slocumb law, and was based upon the bond, and that under the rule laid down in *Andresen v.*

Jetter, 76 Neb. 520, the petition was not sufficient to entitle plaintiff to recover. The petition nowhere alleges that plaintiff's injuries were received in consequence of the defendant's traffic in intoxicating liquors, nor that defendant's traffic caused or contributed to his injuries. The petition seems to be entirely insufficient to permit a recovery upon the liquor bond. The plaintiff contends that the action is one to recover damages for assault and battery. The petition appears to contain all the allegations that are essential to a recovery in such an action. There are other allegations that are not essential, but they do not have the effect to destroy the force of the allegations which are properly contained in a petition. The action must be construed as being one to recover damages for assault and battery.

The defendant assails a number of instructions given by the court, upon the theory that they were not properly given in an action upon a liquor license bond. The view that we have taken of the petition renders it unnecessary to consider these objections.

The defendant also complains of the second instruction given by the court because it does not submit to the jury the question of justification or the amount of force that the defendant might properly have used in ejecting the plaintiff from his premises. The defendant denied that there was any assault and battery. The issue of justification was not presented by the pleadings. In *Barr v. Post*, 56 Neb. 698, it is said: "In a civil suit for assault and battery, where the answer is a general denial, evidence of justification is inadmissible." In the present action no evidence of justification was offered. The issue was not presented, and the court could not properly submit that issue to the jury.

By the third instruction the court told the jury that, if they were satisfied by a preponderance of the evidence that defendant did not touch or push the plaintiff from the rear door of the saloon, or if they were not satisfied by a preponderance of the evidence that the defendant

did push the plaintiff with force and violence from the rear door of the saloon, they should find for the defendant. The defendant criticises this instruction because it does not properly define assault and battery. The instruction does not define or attempt to define assault and battery, but there is nothing contained in the instruction that is prejudicial to the defendant, and no error is perceived in the giving of the instruction.

The fourth instruction given by the court is as follows: "If you should find for the plaintiff, then you will assess his damages in any sum not exceeding \$5,000 which you may find will compensate him for the injuries received; and this will include his loss of time, his pain and suffering and mental anguish, taking into consideration, at the same time, the age of the plaintiff." The defendant contends that this instruction was erroneous because it did not confine the jury to a consideration of the evidence in determining the amount of plaintiff's recovery. In *Hoover & Son v. Haynes*, 65 Neb. 557, an instruction which directed the jury that, "in the event that you find from the evidence for the plaintiff, you will assess in his favor such damages, within the amount claimed, which is \$2,500, as you think he has sustained by reason of the facts alleged in his petition," was held erroneous for the reason that it did not confine the jury to a consideration of the evidence in ascertaining the amount of plaintiff's recovery. In commenting upon the instruction the court said: "Instead of telling the jury they are to be governed by the evidence introduced on the trial, they are told to substitute what they think in its stead, and the only limit placed upon what they think is \$2,500, and the basis of their thought is not the facts established by the evidence, but the allegations contained in the petition." But we think there is a difference between the instruction given in *Hoover & Son v. Haynes* and the fourth instruction in the instant case. It is a well-established rule of law that the whole of the court's charge to the jury should be considered together. By the second instruction the

court stated to the jury the facts which plaintiff was required to prove to entitle him to a recovery, and informed the jury that, if plaintiff had proved these facts by a preponderance of the evidence, then he would be entitled to recover such sum as he may have suffered by reason of the injury sustained. Taking the second instruction together with the fourth instruction, we think the inference is clear that the amount of damages should be ascertained by the jury from the evidence, and the following language from the fourth instruction, "then you will assess his damages in any sum, not exceeding \$5,000, which you may find will compensate him for the injuries received," clearly meant, and was understood by the jury to mean, such sum as they should find from the evidence would compensate the plaintiff for the injuries received. The defendant also complains of the fourth instruction because it permitted the jury to take into consideration pain, suffering and mental anguish, when there was no direct allegation in the petition that plaintiff had suffered any pain or mental anguish. The rule is well established that no allegation of special damage is necessary to recover for mental suffering, where such suffering is allowed as an element of damages, since it is inseparably connected with and attends personal injuries. In *Brown v. Hannibal & St. J. R. Co.*, 99 Mo. 310, it was held that, since physical pain and mental anguish usually and to some extent necessarily flow from or attend bodily injuries, the jury might infer them from the facts alleged, and that, where bodily injuries are alleged in the petition and proved, the plaintiff's physical pain and mental anguish are proper elements of damage, though not stated in the petition. This proceeds upon the theory that damages which are the natural and necessary result of an injury need not be specially pleaded. The instruction properly directed the jury to consider the plaintiff's pain and mental anguish. The defendant further contends that the fourth instruction permitted the plaintiff to recover for future mental pain and suffering, without

limiting the recovery to such future pain and suffering as was reasonably certain to be endured by the plaintiff. We think that a careful examination of the instruction will disclose that it does not refer to any future pain or suffering, but is limited to that which the plaintiff had already suffered. The instruction is not subject to any of the criticisms made and appears to have been properly given.

The defendant complains because the court failed to submit to the jury the issue of contributory negligence. A sufficient answer to this is that, while contributory negligence was pleaded by the defendant, the evidence fails to disclose that there was any contributory negligence or any negligence upon plaintiff's part. It was neither necessary nor proper for the trial court to submit to the consideration of the jury a defense that had no support in the evidence.

The defendant complains that the verdict and judgment are not sustained by and are clearly contrary to the weight of the evidence. Plaintiff testified that he received his injuries substantially in the manner alleged in the petition, and there is but slight corroboration of his testimony. Two ladies, who were passing along a sidewalk just opposite the saloon building, testified that they heard loud talking and sounds as of shuffling or running across the floor of the saloon, and as they reached a point on the walk opposite the rear end of the saloon they heard a man groan; that they went on a few steps, and then returned to ascertain who was injured, and discovered the plaintiff lying upon the ground with his leg broken. Upon the other hand, the evidence shows that about 12 or 14 feet of the rear of the saloon was separated from the front part by a partition, in which there was an archway, and that the rear door of the saloon was some 12 or 14 feet from the partition. There were four or five persons in the saloon at the time of the controversy, all of whom, with the defendant, testified that defendant did not touch or strike the plaintiff; that plaintiff ran out of the saloon to the rear door, and defendant followed him no further

Ballard v. Cerney.

than to the archway in the partition, and that defendant did not get closer than 10 or 12 feet to the plaintiff. It will be observed that the greater number of witnesses as to the assault and battery is upon the part of the defendant. But the weight of the evidence and the credibility of the witnesses are questions for the jury. The jurors and the trial judge saw the witnesses, and had the opportunity of observing their appearance, their fairness and candor, or lack thereof, and their manner of testifying, and were better able to determine what weight should be accorded their testimony than the appellate court. While we might have arrived at a different conclusion from that reached by the jury, that is no sufficient reason for setting aside a verdict that is based upon conflicting testimony. The question of fact was properly submitted to the jury and determined adversely to the defendant. The verdict will not be disturbed by this court.

We find no prejudicial error in the record, and recommend that the judgment of the district court be affirmed.

DUFFIE, EPPERSON and CALKINS, CC., concur.

By the Court: For the reasons given in the foregoing opinion, the judgment of the district court is

AFFIRMED.

ELIAS BALLARD, APPELLANT, v. JOSEPH CERNEY, TREASURER, APPELLEE.

FILED FEBRUARY 20, 1909. No. 15,857.

Village warrants drawn in excess of 85 per cent. of the current levy for the purpose for which they are drawn, unless there shall be sufficient money in the village treasury to the credit of the proper fund for their payment, are void, and their payment will be enjoined at the suit of a resident taxpayer.

APPEAL from the district court for Saline county:
LESLIE G. HURD, JUDGE. *Reversed.*

Bartos & Bartos and Hall, Woods & Pound, for appellant.

W. G. Hastings, contra.

GOOD, C.

Plaintiff, a resident taxpayer of the village of Wilber, brought this action to enjoin the village treasurer from paying certain particularly described village warrants. The grounds upon which the injunction was sought were: First, no appropriation had been made against which said warrants could be drawn; second, no estimate had ever been made on which to base an appropriation ordinance appropriating money for the payment of said warrants; third, said warrants had been drawn in excess of 85 per cent. of the current levy for the purpose for which they were drawn, and that they were drawn when there was no money in the treasury to the credit of the proper fund for the payment of said warrants. A general demurrer to the petition was sustained, and, plaintiff electing to stand upon his petition, a judgment of dismissal was entered. Plaintiff has appealed.

Plaintiff contends that the warrants were absolutely void, and that injunction will lie to enjoin their payment. Defendant contends that the defects complained of are mere irregularities in the issuance of the warrants, and do not go to the validity of the indebtedness which the warrants represent, and that plaintiff cannot enjoin the payment of warrants if they represent just and valid claims against the city, and also contends that the warrants show that they were drawn for an indebtedness for maintaining village light and water plants, and that as the municipality was authorized by statute to make contracts for the erection and maintenance of such plants and to furnish light and water for a profit, if it saw fit, unappropriated general funds in the treasury might be used for such purpose.

Section 8969, Ann. St. 1907, which is applicable to the government of villages, provides in part as follows: The village board shall have no power to appropriate, issue or draw any order or warrant on the treasury for money, unless the same has been appropriated or ordered by ordinance, or the claim for the payment of which the warrant is issued has been allowed according to the provisions of the charter, and that the corporate authorities shall not add to the expenditures in any one year anything over and above the amount provided for in the annual appropriation ordinance for that year, except as otherwise specially provided. Section 8970 prohibits the mayor and council from making any contract or incurring any expense, unless an appropriation shall have been previously made concerning such expense, except as otherwise specially provided. Construing similar provisions of the statute, this court has held, in *Christensen v. City of Fremont*, 45 Neb. 160, that unappropriated general funds in a city treasury might be used for maintaining a light system, and that for such purposes no general appropriation ordinance was necessary as provided by statute. In *City of North Platte v. North Platte Water Works Co.*, 56 Neb. 403, and *Lincoln Land Co. v. Village of Grant*, 57 Neb. 70, it was held that section 8970 had no application to indebtedness or contracts creating it on account of water plants and their maintenance, as they come within the exception mentioned in the statute, and that no appropriation or estimate was necessary to the creation of such indebtedness. Several of the warrants in this case are drawn on the water fund and electric fund, respectively. The plaintiff failed to allege any facts showing these warrants were not within the exception, and as to those warrants it does not affirmatively appear that an estimate should first be made and an appropriation ordinance passed to authorize their issuance.

The other objection to the issuance of the warrants is a more serious one, viz., that they were issued in excess of 85

per cent. of the current levy and without any money to the credit of the funds on which they were drawn. Section 8962, Ann. St., 1907, provides: "Upon the allowance of claims by the council or trustees, the order for their payment shall specify the particular fund or appropriation out of which they are payable as specified in the annual appropriation bill to be passed in the manner hereinafter provided; and no order or warrant shall be drawn in excess of 85 per centum of the current levy for the purpose for which it is drawn, unless there shall be sufficient money in the treasury at the credit of the proper fund for its payment; and no claim shall be audited or allowed except an order or warrant for the payment thereof may legally be drawn." Under this section of the statute the village trustees were prohibited from issuing or drawing any warrant in excess of 85 per cent. of the current levy for the fund on which it was drawn, unless there was sufficient money in the treasury to the credit of the proper fund for its payment. In *Christensen v. City of Fremont*, *supra*, it appears that the money was on hand and in the treasury for the payment of the warrants drawn. The provisions of the statute relative to the issuance and payment of the warrants by the counties are quite similar to those regulating the issuance and payment of warrants by villages. *National Life Ins. Co. v. Dawes County*, 67 Neb. 40, was an action brought to recover on county warrants that had been issued in excess of 85 per cent. of the current levy. It was held that warrants so issued were void, and no recovery could be had thereon. In the opinion it is said: "In the case at bar, the objection to the validity of the warrants is not that the officers failed to comply with some law or rule of action relative to the mere time or manner of their procedure with which they might have complied; but the objection is that the officers could not by any manner of procedure issue any valid warrants against the fund in question. They were absolutely prohibited by statute

Ballard v. Cerney.

from so doing." *Bacon v. Dawes County*, 66 Neb. 191, was also an action to recover on county warrants issued in excess of 85 per cent. of the current levy. It was there said: "There can be no doubt that warrants drawn after 85 per cent. of the amount levied for the year is exhausted are not chargeable against the county where there are no funds in the treasury for the payment of the same. * * * If the county board could bind the county in this manner, it could evade all restrictions on the amount of the levy. It follows that the plaintiff cannot recover upon the warrants so drawn." In *Grand Island & W. C. R. Co. v. Dawes County*, 62 Neb. 44, it was held that a three-mill levy to pay warrants that had been issued in excess of the limit of 85 per cent. prescribed by the statute was illegal and the tax was void, and its collection was enjoined at the suit of a taxpayer. *Kelly v. Broadwell*, 3 Neb. (Unof.) 617, was a suit brought by a taxpayer to enjoin the treasurer of South Omaha from paying certain city warrants. It was alleged in the petition that no estimate had been made, no appropriation ordinance passed, and no fund provided against which the warrant could be lawfully drawn. It was there said that, if the record shows that these acts or any of them were not performed, then the warrants are illegal, and are not a lawful charge against the city, and the decree enjoining their payment must be affirmed. Under the statutes above quoted and the decisions of this court, we think the conclusion is irresistible that the warrants in question were issued without any authority of law and are absolutely void, and payment thereof should be enjoined at the suit of a taxpayer.

It follows that the judgment of the district court should be reversed and the cause remanded.

DUFFIE, EPPERSON and CALKINS, CC., concur.

By the Court: For the reasons given in the foregoing opinion, the judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED.

KATE W. DAVIS, ADMINISTRATRIX, APPELLANT, v. CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY ET AL., APPELLEES.

FILED FEBRUARY 20, 1909. No. 15,403.

Negligence: DIRECTING VERDICT. The question of negligence and contributory negligence is usually a question to be submitted to a jury, but where the facts are undisputed, and such that reasonable minds can draw but one conclusion therefrom, it is the duty of the court to direct a verdict.

APPEAL from the district court for Saunders county:
BENJAMIN F. GOOD, JUDGE. Affirmed.

C. S. Polk and O. B. Polk, for appellant.

James E. Kelby, Halleck F. Rose, Frank E. Bishop and Fred M. Deweese, contra.

CALKINS, C.

This was an action against the defendant railway company and one of its locomotive engineers for negligently causing the death of Stephen A. Davis, plaintiff's intestate. At the close of plaintiff's testimony the trial judge directed a verdict for defendants, and from a judgment rendered upon this verdict the plaintiff appeals.

Mr. Davis was in the employ of the owners of a stone quarry which was reached by a spur track about three miles long, leaving the main line of the defendant railroad at Cedar Creek, a station about six miles west of Plattsmouth. He resided in Plattsmouth. Under his employment it was part of his duty to go to the quarry in the morning to bill out loaded cars and have empty cars set for loading. For many months he had been accustomed to leave Plattsmouth on an early morning freight train which carried passengers in its way car. When this train arrived at Cedar Creek it was usually run out on the station siding. There was

a siding to the spur track, upon which cars for the quarry were stored, and it was customary for the train crew with the engine to make up a train for the quarry, Mr. Davis directing what cars he wished taken to the quarry, and the order in which he desired to have them placed. When this train was made up, he usually rode to the quarry on a flat car, the way car being left at Cedar Creek, and sometimes in the cab of the engine, returning in the same manner. On the morning of the accident, two flat cars for the quarry had been run upon the spur track, upon one of which the train conductor and Mr. Davis were standing. The conductor then left the car and went about making up the train for the quarry in compliance with the directions which he had received from Mr. Davis. Mr. Davis remained standing upon a flat car, with twelve-inch boards at the end presumably to keep the stone from slipping off between the cars. The engine was then attached to a coal car having side and end boards about three feet high, and this car was propelled toward the car upon which Mr. Davis was standing, being cut loose from the engine after gaining headway, and left to reach the other cars by its own momentum. This method of shunting cars was described by the witnesses as "kicking in." The head brakeman was riding on the coal car kicked in, and, discovering that the car had not sufficient momentum to reach and couple onto the cars standing upon the track, he jumped off the car and pushed, but was unable to bring it nearer than within one or two feet of the cars standing upon the track. That Mr. Davis was conversant with what the train men were doing appears from the fact that he jokingly remarked to the brakeman that he was not a very good locomotive. After this the train crew coupled to a string of seven flat cars, and kicked them in upon the spur track with the object of coupling them to the coal car before kicked in, and causing that car to couple to the two cars, upon one of which Mr. Davis was standing. The same brakeman was in charge of the string, and, after partially setting the brake upon the car which

was in front of the seven and nearest Davis, he went back to the brake on the next car, but he is uncertain as to which end of that car the brake was on. He was the only eye witness of the accident. He testified that, when the cars approached to within about a car length of the coal car, he saw Mr. Davis, who was standing near the end of the car next to the approaching string. The witness states that he was within two or three feet of the end of the car, but admits that the coal car with the end boards three feet high was between him and Mr. Davis. He testifies that Mr. Davis' attention was fixed upon a memorandum book which he held in his hand, that he called to him to "Look out!" and that Davis looked up and toward him, and then looked down again; that, when the cars struck, Mr. Davis fell off the end of the car, and was run over by the trucks of the coal car and the front trucks of the next car, receiving injuries from which he died in about 20 or 30 minutes. The cars were equipped with automatic couplers, and the evidence discloses that they needed to be brought together with some force in order that the couplings should connect. The testimony of the witness Wagner is that the string of cars was moving at from four to six miles an hour, and that they came together with more force than was used sometimes and less than at others. It also appears from the evidence of this witness that he made no effort to set the brake after he gave the warning to Mr. Davis, and that a prompt setting of the brake at that time would have reduced the momentum of the moving cars and the violence of their impact.

It is contended by the plaintiff that, conceding that the deceased carelessly placed himself in a dangerous position, the evidence justified the submission to the jury of the question whether the brakeman Wagner did not discover his peril in time to avoid the injury by the use of reasonable care on his part. If Mr. Davis had been standing on the track in a place of positive danger, and his conduct had been such as to indicate to the brakeman in charge of the approaching cars that he was oblivious to his

jeopardy, it would have been the duty of the brakeman to use every effort to check the speed of the cars in order to avoid the injury if possible. But in this case Mr. Davis was not in a position of positive danger. He was, as the brakeman knew, accustomed to be upon such cars, and acquainted with the effect of the impact resulting from switching cars. The brakeman had a right to assume that he had gained some skill in the practice of preserving his equilibrium under such circumstances. A person so experienced would naturally meet the danger of such a shock, not by jumping from the car, but by bracing himself so as to resist the tendency to fall. There was nothing therefore in his conduct to indicate to the brakeman that he was unprepared. True it is that the brakeman testified that Mr. Davis was standing within two or three feet of the end of the car, but the admitted facts show that it would have been impossible, on account of his position and the intervening coal car, for the brakeman to see with any degree of accuracy how near the end of the car Mr. Davis stood. It is fair to say that the accident resulted from the deceased's being unprepared to meet the shock, or from his standing so near the end of the car, or both, and we are satisfied that the evidence is insufficient to justify a finding by a jury that the existence of these conditions was apparent to or should have been discovered by the brakeman. Had the question been submitted to the jury upon this evidence and a verdict found for the plaintiff, it would have been the duty of the court to set it aside. In such cases the court should direct a verdict in justice to the parties and the jury, which is put in a false position where it is directed to deliberate upon evidence from which it can reach but one possible conclusion.

We therefore recommend that the judgment of the district court be affirmed.

DUFFIE and EPPERSON, CC., concur.

GOOD, C., not sitting.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

ROOT, J., not sitting.

**MATTHEW H. GLASSEY, APPELLANT, v. JACKSON DYE,
APPELLEE.**

FILED FEBRUARY 20, 1909. No. 15,486.

1. **Assault and Battery: JUSTIFICATION.** Where one has entered the premises of another for the purpose of notifying him of the straying of his stock, and the landowner thereupon orders him to depart, his failure to do so instantly, unaccompanied with any threat or violence toward the landowner, does not justify the latter in using a deadly weapon to eject him.
2. ———: **INSTRUCTIONS.** Where the plaintiff entered upon defendant's premises to notify him of the straying of his stock, and the defendant thereupon ordered him to depart, and upon his failure to do so instantly assaulted him with a deadly weapon, breaking his arm, it was error for the court to instruct the jury that the defendant might use such force as was necessary in self-defense, or to prevent receiving bodily harm, it not appearing that the plaintiff in anywise attacked or threatened the defendant.
3. ———: ———: **MITIGATION OF DAMAGES.** Where the plaintiff brought his suit for two alleged assaults pleaded as separate causes of action, and there was no evidence whatever that the plaintiff had at the time of or shortly previous to the second assault used provocative or threatening language toward the defendant, it was error to charge the jury generally that, if they believed from the evidence that plaintiff recently before or at the time of the alleged assault had used provocative or threatening language toward the defendant, they might take that circumstance into consideration in mitigation of damages.

APPEAL from the district court for Custer county:
BUNO O. HOSTETLER, JUDGE. Reversed.

Sullivan & Squires, for appellant.

A. S. Moon, contra.

CALKINS, C.

This was a civil action to recover damages for an assault and battery. There was a verdict and judgment for the defendant, and the plaintiff appeals.

1. The plaintiff sought to recover for two assaults pleaded as separate causes of action; the first occurring on the 11th day of July, and the second on the 23d of the same month. In the view we have taken of the case, it will only be necessary for us to consider the facts of the latter date. It appears that the parties were neighboring farmers, between whom there had been considerable friction, and that the defendant had forbidden plaintiff to come upon his premises. On the morning of July 23 the plaintiff found a steer belonging to defendant upon his premises. He got upon a pony and rode to the house where defendant, with a Mr. Lewen, who was working his farm, resided, for the purpose of informing Mr. Lewen of the straying of the steer. His account of the transaction is that he rode up and called to Mrs. Lewen, whom he saw through the screen door, and thereupon the defendant came out with a gun, threatened to kill him, and struck him with the gun, breaking his arm. The defendant's account of the transaction was that the plaintiff rode up to the house, and said a calf had got out of defendant's pasture and was in plaintiff's corral; that thereupon the defendant said to him, "Well, now you have told your story I want you to get out of my yard with your horse"; that he didn't go, and defendant stepped into the house and got a gun, and told him, "I want you to be going"; and that, plaintiff remaining sitting on his horse, the defendant struck at his horse with the gun; that the horse jumped and that he supposed he hit the plaintiff on the arm with the gun. There was no evidence that the plaintiff had said anything except to inform the defendant of the whereabouts of the stock, nor that he did anything to excite or provoke the defendant, unless his failure to depart as soon as defendant thought he should might be

so regarded. The defendant's conduct, according to his own statement, was insulting, violent and unreasonable. The plaintiff had entered the defendant's premises upon a friendly errand, and his failure to depart instantly upon being told so to do did not justify the defendant in using a deadly or dangerous weapon to eject him. *Everton v. Esgate*, 24 Neb. 235; and see note to *Hannabalsen v. Sessions*, 93 Am. St. Rep. 250 (116 Ia. 457). The plaintiff asked the district court to instruct the jury to this effect, which it refused to do. The jury were told that defendant had the right in law to use such amount of force as was reasonably necessary under the circumstances to remove the plaintiff from his premises; but they were left the sole judges of what force was necessary, and were given no assistance by the court upon the question as to whether the use of deadly and dangerous weapons under the circumstances was justified in law. The practice of menacing by fire arms is an extremely dangerous one, and its indulgence leads directly to deadly assaults and homicides. It should be resorted to only in extreme cases and as a last recourse in the defense of life and property from serious injury. We think the failure of the court to properly instruct the jury on this question was likely to leave them under the mistaken impression that the law permitted the use of fire arms upon slight pretexts and for trivial causes.

2. The twelfth instruction given by the court on its own motion was as follows: "The jury are instructed that, while the law will not excuse or justify the use of more force than is reasonably apparently necessary to eject an intruder upon the premises of a person or than is reasonably necessary in self-defense and to prevent receiving bodily harm, still the law does make a reasonable allowance for the infirmity of human judgment under the influence of sudden passion or provocation, and it does not require men to reason with mathematical exactness the degree of force necessary to eject a person or to repel an assault. The jury must determine from all the

evidence and from all the facts and circumstances proved on the trial whether he did use more force and violence than was apparently reasonably necessary under the circumstances surrounding this case." This instruction was not applicable to the facts proved. The defendant was not attacked, and therefore nothing was necessary to be done by him in self-defense and to prevent his receiving bodily harm. There was no provocation, and therefore there was no allowance to be made for the infirmity of human judgment under its influence. While in a criminal case the fact that an act was done under the influence of passion may alter its character, we doubt the validity of any such rule applied to an action to enforce a civil liability, for in such case a defendant is to be held liable for the consequences of his act, irrespective of his intention. However that may be, the instruction above quoted should not have been given in this case and under the facts as shown.

3. The sixteenth instruction given by the court told the jury that, if it believed from the evidence that plaintiff recently before the alleged assault had used provocative and threatening language toward the defendant, and at the time by language and conduct aggravated defendant into making an unlawful assault, they might take such circumstance into consideration in mitigation of damages. This instruction was not confined exclusively to either cause of action, but was given as applicable to both. There is absolutely no evidence that the plaintiff used any provocative language on the 23d day of July, nor at any time between the 11th day of July and that date. The instruction was therefore misleading and erroneous. *Langdon v. Clarke*, 73 Neb. 516. Since punitive damages cannot be recovered in this state, it logically follows that the rules with regard to the mitigation of such damages, which obtain in states where exemplary damages are allowed, are not applicable here, and the above instruction is erroneous for that reason also. *Mangold v. Oft*, 63 Neb. 397. The remedy by action to recover damages for assaults and batteries, when properly administered, is an

Singer Sewing Machine Co. v. Omaha Umbrella Mfg. Co.

efficient factor in the preservation of peace and order. Men of violent disposition, responsible financially, who care little for fines imposed by magistrates under criminal suits, have a wholesome dread of such actions in jurisdictions where they are properly enforced. They should not therefore be lightly regarded, but the right to recover in such cases should be upheld and enforced.

We therefore recommend that the judgment of the district court be reversed and the cause remanded for a new trial.

DUFFIE, EPPERSON and GOOD, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded for a new trial.

REVERSED.

DEAN, J., having been counsel below, took no part in this decision.

SINGER SEWING MACHINE COMPANY, APPELLEE, v. OMAHA
UMBRELLA MANUFACTURING COMPANY ET AL., AP-
PELLANTS.

FILED FEBRUARY 20, 1909. No. 15,491.

Sales: OPTION. Where the owner of sewing machines places the same in possession of a prospective purchaser on trial and with an option to purchase at a fixed valuation, but with no agreement to pay rent therefor, such transaction does not constitute a conditional sale nor lease within the meaning of section 26, ch. 32, Comp. St. 1907.

APPEAL from the district court for Douglas county:
WILLIS G. SEARS, JUDGE. *Affirmed.*

Richard S. Horton, for appellants.

John E. Quinn, contra.

CALKINS, C.

This was an action in replevin to recover possession of sewing machines seized by the defendant Simpson under a writ of attachment directed to him as constable and commanding him to take the property of the defendant the Omaha Umbrella Manufacturing Company. There was a trial to the court and a finding and judgment for plaintiff, from which defendant Simpson appeals.

It appears that some time in July, 1907, the plaintiff installed the machines in question in the shop of the umbrella company. The agent of the plaintiff and the president of the umbrella company, who, respectively, represented their companies in the transaction between them, both testified that the machines were installed for trial, and that before the levy of the attachment the umbrella company had decided not to accept them and had so advised the plaintiff. It appears, however, that after the installation of the machines, and before the levy, the president of the umbrella company signed a paper which the defendant Simpson characterizes as a conditional contract of sale. It is his contention that this paper, not being recorded, is, so far as it retains any property in the machines in the plaintiff, void as to attaching creditors under section 26, ch. 32, Comp. St. 1907, which provides "that no sale, contract, or lease, wherein the transfer of title or ownership of personal property is made to depend upon any condition, shall be valid," etc., unless the same be in writing and a copy thereof filed with the clerk of the county. This document, a copy of which is attached to the record, appears to have been a blank printed form prepared by the plaintiff for leasing sewing machines to intending purchasers. The blank left for the description of the goods is filled out with an enumeration of the property in question, which is there stated to be of the value of \$214.50. There are suitable blanks left in the printed form for the insertion of the amount of rent and the time and manner in which it is to be paid; but none of these blanks are filled, and as a necessary consequence there is

no rent stipulated nor agreed to be paid. There is a stipulation that the umbrella company is to use the machines with care and keep them in good order. There is no agreement to purchase contained in the instrument; but at the end there is printed the clause: "And it is further agreed that _____ may at any time within said rental term purchase the said chattel _____ and apparatus by paying the above valuation therefor, providing the terms and provisions have been punctually complied with, and then, and in that case only, the rent theretofore paid shall be deducted therefrom."

It is a general rule that, where words are omitted from a contract or contradict one another, the ambiguity is patent. In such cases, explanatory evidence not being admissible, the contract fails. Anson, Contracts (2d Am. ed.), p. *248. The rule as stated by Mr. Stephen (Stephen, Digest of the Law of Evidence, art. 91) is: "If the words of a document are so defective or ambiguous as to be unmeaning, no evidence can be given to show what the author of a document intended to say." Applying these principles, the contract, as it stands, amounts to no more than an acknowledgment on the part of the umbrella company that it held the machines as the property of the plaintiff, and that it would use them with care and keep them in good order, and an option by the plaintiff to the umbrella company to purchase the same at the valuation given. This is not a sale, contract or lease wherein the transfer of title or ownership of personal property is made to depend upon any condition, and it is not therefore within the provisions of the statute relied upon. *McClelland v. Scroggin*, 35 Neb. 536. The contract established by the oral testimony was not inconsistent with the writing, so construed, and we can discover no error in the finding and judgment of the district court.

We therefore recommend that the judgment of the district court be affirmed.

DUFFIE, EPPERSON and GOOD, CC., concur.

Killeh v. Funk.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

PATRICK KILLEN, APPELLEE, v. OSCAR D. FUNK, APPELLANT.

FILED MARCH 5, 1909. No. 15,481.

Vendor and Purchaser: LAND IN HIGHWAY. While a public highway along and upon agricultural land is an easement, and easements are, as a general rule, incumbrances, yet, such easement tending to increase rather than diminish the value of the estate, the sale of the land upon which the highway exists, without a reservation of the land upon which the easement is located, does not furnish a breach of the contract to convey the whole, and a purchaser of such a tract will be liable to pay the contract price for all the land conveyed, including that portion occupied by the highway.

APPEAL from the district court for Colfax county:
JAMES G. REEDER, JUDGE. *Affirmed.*

J. A. Grimison, for appellant.

John J. Sullivan and Louis Lightner, contra.

REESE, C. J.

This action was instituted in the district court for Colfax county. The suit grew out of a contract by which one Homer B. Robinson sold and conveyed to the defendant all that part of a certain tract of land described as the west half and the southwest quarter of the northeast quarter of section 13, township 18, range 4, in Colfax county, lying north of Maple creek, a stream which bisected the land owned by Robinson. The written contract is set out in the petition and is as follows: "Agreement. Aug. 19, 1905. H. B. Robinson agrees to sell, and O. D. Funk agrees to purchase, the following described lands

Killen v. Funk.

in the manner here stated: All of the land in the west half of sec. 13-18-4 laying north of the creek and the S. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of 13-18-4 laying north of the creek at \$67.40 per acre. Said land to be paid for as soon as Robinson has it surveyed and notifies Funk. Funk is to receive all rents for 1905, said land to be clear of all incumbrances and title perfect. O. D. Funk. H. B. Robinson." The land was surveyed and reported to Robinson as containing 173.215 acres, for which defendant paid the contract price of \$67.40 an acre, amounting to \$11,674.69. A deed of conveyance was made in accordance with the contract, and following the description with the clause "all containing 173.215 acres, more or less." Robinson afterwards sold the land south of the creek to plaintiff, and upon a survey being made it fell short of what it was thought to contain; that is, the two tracts did not appear to contain the number of acres known to be included in the whole tract. Attention was then directed to the survey of the tract sold defendant, when it was ascertained that the surveyor had excluded from his estimate of the quantity of land a public highway along the north side of the land sold to defendant. Robinson then assigned his claim against defendant to plaintiff for the purchase price of the portion thus alleged to have been omitted, and for which plaintiff brought this suit, claiming the omission was by mistake of the surveyor. The trial in the district court resulted in a judgment in favor of plaintiff, from which defendant appeals. It is conceded that the question of defendant's liability depends upon whether the public road along and on the margin of the land constitutes such an incumbrance as will, under the contract, exempt defendant from payment for the land included therein. This is the sole question involved.

The case of *Harrison v. Des Moines & Ft. D. R. Co.*, 91 Ia. 114, is cited and relied upon by plaintiff as supporting his right to recover. That suit was in effect an action for a breach of a covenant of warranty in a deed of conveyance; there being public highways upon the land not

excepted from the covenant. It was held that no action could be maintained. The opinion of the court is exhaustive in its reasoning, and holds that "no easement should be regarded as an incumbrance to an estate, which is essential to its enjoyment, and by which its value is presumably advanced"; that by the system of public highways "the landed estates become mutually servient, and in such a way that the easements are mutually advantageous, and the respective land values enhanced thereby"; and that "such an easement is not an incumbrance." While we approve the logic and reasoning in that case, yet we are not unmindful of the fact that it is in direct conflict with many decisions in this country, and is possibly prompted more by a consideration of "the general welfare" than any well-established rule of law. Indeed, the writer of the opinion says it is conceded that the authorities are not uniform on the question (citing cases both ways), and that "both lines of authorities have support from rulings on kindred questions, and nothing less can be said, on authority, than that the question is one of grave doubt."

In this state, as in Iowa, practically the whole course of conveyances has been to treat public roads as an essential and necessary betterment, and not an incumbrance which depreciates the value of the land, and, hence, they have rarely been excepted from covenants in deeds of conveyance, and yet not considered as inimical to full covenants of seizin and warranty. We agree with the decision in the case above cited that no action could be maintained on covenants of seizin and warranty under the circumstances. This being true, there would seem to be no good reason why plaintiff might not recover in this action for the value of the land conveyed, but, owing to an error on the part of the surveyor, not paid for.

The judgment of the district court is therefore

AFFIRMED.

**KATHERINE MONTGOMERY, APPELLEE, v. HARRY M. MILLER,
APPELLANT.**

FILED MARCH 5, 1909. No. 15,531.

Assault and Battery: INSTRUCTIONS: HARMLESS ERROR. In an action by a married woman for damages caused by an assault and battery, it is *held* not prejudicially erroneous, under the issues and evidence submitted, for the court to instruct the jury that they might consider any loss of earning capacity which might have been caused to plaintiff by the assault, if the jury found in her favor.

APPEAL from the district court for Lancaster county:
LINCOLN FROST, JUDGE. *Affirmed.*

Clark & Allen and *R. C. Ozman*, for appellant.

Talbot & Allen and *Hainer & Smith*, *contra.*

REESE, C. J.

This is an action to recover damages for personal injuries sustained by plaintiff by reason of an alleged unprovoked assault made upon her by defendant, which she avers consisted of striking, seizing and violently pushing her upon and against certain chairs, furniture and fixtures and upon the floor, whereby she was seriously hurt and injured, both externally and internally; that at the time of the alleged assault she was the wife of George P. Montgomery, with whom she was living, and was then pregnant, and by reason of the injuries inflicted upon her she was caused to miscarry and give premature birth, the child being still-born. The petition contains the usual allegations as to the injury and damage resulting from the alleged assault. The expenses of nurses and physician were also alleged. The answer is a general denial. A jury trial was had, which resulted in favor of plaintiff for the sum of \$2,000, and upon which judgment was ren-

Montgomery v. Miller.

dered; a motion for a new trial being overruled. The case is brought to this court by appeal.

There was a direct irreconcilable conflict in the evidence upon every material part of the case, but the jury adopted the plaintiff's version as the true one. The motion for a new trial and the assignments of error in this court include a number of grounds. It is considered necessary to notice but one; the others being deemed to be without merit. It is contended that the giving of the seventh instruction, given by the court upon its own motion, was prejudicially erroneous. It is as follows: "In the event that you find from the evidence and under these instructions in favor of the plaintiff, then you will assess her such damages as will compensate her for the injuries received. You will allow her no speculative damages or damages by way of punishment, but such as are compensatory merely. You may take into consideration the character of her injuries, and whether they were the proximate cause of the miscarriage which she later had, and any physical or mental pains and sufferings occasioned thereby, and any loss of earning capacity which has been caused thereby. In this connection you are instructed that the plaintiff cannot recover for loss of service or companionship which belonged to the husband, or for such incapacities sustained by her which prevented her performing the duties that reasonably devolved upon her in the marriage relation. For such elements the husband alone can recover. On the other hand, should you find for the defendant, you will so say by your verdict."

The particular part of the instruction to which objection is made is that part which directs the jury to consider "any loss of earning capacity which has been caused thereby." The basis of the assault upon this language is that there was no averment nor testimony showing the extent of the earning capacity of plaintiff before the alleged injury. It is alleged in the petition that by reason of the assault and resulting injury she "became permanently sick, lame and disordered, and has since been unable to attend her or i-

Montgomery v. Miller.

nary duties and business, and was compelled to employ the services of nurses and physicians," etc. The evidence as to the earning capacity of plaintiff, or what she was engaged in before the date of the alleged assault, is very meager. Her husband testified that at that time one person was boarding with them, and on account of her sickness and inability to perform her duties the boarding of that person had to be discontinued, and plaintiff testified to having gone to the theater (defendant's place of business) to sell tickets for him. Neither one was cross-examined upon these subjects. Section 4, ch. 53, Comp. St. 1907, provides that the earnings of any married woman from her labor or services shall be her sole and separate property. This, when considered in the light of all the evidence in the case, would probably be sufficient to excuse the use of the language in the instruction. However, we do not think the phrase made use of could work any prejudice to defendant, and this is especially true, since the jury were so clearly instructed that she could not recover for loss of service to which the husband was entitled, or for such incapacities as would prevent her performing the duties that reasonably devolved upon her in the marriage relation. Any other holding, under the law of this state, would be too narrow and technical to admit of justification. We find no prejudicial error in the instruction.

One of the errors assigned, both in the motion for a new trial and in the assignments here, is that the verdict is excessive. This is not discussed in the briefs, and was not argued at the bar, and must therefore be considered as waived.

The judgment of the district court is

AFFIRMED.

Layton v. Sarpy County.

HARMON G. LAYTON, APPELLEE, V. SARPY COUNTY,
APPELLANT.

FILED MARCH 5, 1909. No. 15,571.

Counties: DEFECTIVE BRIDGES: DAMAGES. Where a steam traction engine is injured by reason of defects in a bridge upon the public highway for which a county is liable in an action to recover therefor, plaintiff can prove the costs of repairs; the amount of recovery being only the actual cost value of such necessary repairs.

APPEAL from the district court for Sarpy county:
HOWARD KENNEDY, JUDGE. *Affirmed.*

Ernest R. Ringo, for appellant.

H. Z. Wedgwood, *contra.*

REESE, C. J.

This is an appeal from the judgment of the district court for Sarpy county. Plaintiff was the owner of a traction engine, which was being driven by him along a public road in that county. In doing so, he had occasion to cross a bridge over one of the streams in the county, when the bridge broke down, and the engine was precipitated into the bed of the stream some ten or eleven feet below, and injured by having some of its parts broken. The suit is for damage to the engine. The trial jury returned a verdict in favor of plaintiff, upon which judgment was rendered, and from which the county appeals. There is no contention that any of the instructions given to the jury were erroneous, or that the case was not fairly submitted to the jury in that regard.

The only contention is that there was no competent evidence as to the amount of damages, and that the court erred in permitting evidence as to what it cost to make the repairs necessary for the restoration of the engine to its original condition. The right of action is based upon

the provisions of section 6197, Ann. St. 1907, which renders counties liable for damages to the owners of property injured by reason of defects in highways and bridges within the county in which the highway or bridge is located. Upon the trial of the case the plaintiff, over the objections of defendant, was permitted to prove the cost or expense of restoring the injured parts of the engine to their original condition so as to make it serviceable, substantially as before the accident, rather than by showing the extent of the diminution in value of the property injured. It is to be conceded that the method of proof of damages contended for by defendant would ordinarily be competent. But the question arises: Is that method of proof exclusive? In case the property is destroyed, or so nearly so as to render its repair, to the extent of restoring it to the use to which it was originally designed, impossible, or even unreasonable, we apprehend the rule contended for would have to be applied. This rule, however, may not be the exclusive or even the proper one under some circumstances. In *McClure v. City of Broken Bow*, 81 Neb. 384, where a mill property was damaged, it was held that proof of the fair and reasonable cost and expense, if any, of restoring the property to the same condition as it was before the injury was permissible. The same rule was announced in the case of injury to personal property caused by a collision between two vehicles, in *Travis v. Pierson*, 43 Ill. App. 579. In *Berry v. Campbell*, 118 Ill. App. 646, it was held that an instruction giving the rule here contended for by defendant was erroneous, although harmless in that case, and that the correct measure of damages in cases of this kind is the reasonable cost of making the repairs. This was held to be the correct rule in *Overpeck v. City of Rapid City*, 14 S. Dak. 507, and a number of cases are cited in the opinion sustaining the decision.

There was no error in the ruling of the district court, and its judgment is

AFFIRMED.

St. Vincent's Parish v. Murphy.

ST. VINCENT'S PARISH, APPELLEE, v. WILLIAM MURPHY,
APPELLANT.

FILED MARCH 5, 1909. No. 15,577.

1. **Religious Societies: USE OF PROPERTY: INJUNCTION.** When property has been acquired by a church organization for the purpose of religious worship in accordance with the doctrine and discipline of a particular denomination, persons claiming under such denomination, and not pretending in any way to hold adversely, or to have any title of their own, except as members thereof, may be enjoined from using such property contrary to the determination of the governing authorities of such denomination.
2. ———: **GOVERNMENT: REVIEW BY COURTS.** Where a local church or parish is a member of a general organization, having general rules for the government and conduct of all of its adherents, congregations and officers, the final orders and judgments of the general organization through its governing authority, so far as they relate exclusively to church affairs and church government, are binding on the local associations and their members and officers, and courts will not ordinarily review such final orders and judgments for the purpose of determining their regularity, or accordance with the discipline and usages of the general organization.

APPEAL from the district court for Seward county:
JAMES G. REEDER, JUDGE. *Affirmed.*

R. S. Norval, J. J. Thomas and M. D. Carey, for appellant.

A. J. Sawyer and C. E. Holland, contra.

BARNES, J.

St. Vincent's parish, a religious corporation, brought this suit in the district court for Seward county against the defendant, William Murphy, who, it is alleged, is a deposed priest of the Roman Catholic church, to restrain him from exercising any of the rights, faculties or privileges of a priest or rector in or upon the church property of the plaintiff, and from hindering, interfering with or in

any manner preventing one Francis A. O'Brien, the regularly appointed priest of said parish, from performing his duties as rector thereof, from in any manner interfering with divine worship in the church of said parish, and from continuing to use, or from attempting to use, the church property or any part thereof. A trial resulted in a decree for the plaintiff, and the defendant brings the case here by appeal.

His first contention is that the plaintiff's petition does not state facts sufficient to confer jurisdiction of this case upon the district court for Seward county. A like proceeding was before this court in *Pounder v. Ashe*, 44 Neb. 672, where it was held that, where charges have been preferred against the minister of the gospel, and he has been deposed from such ministry, and expelled from membership in the church by the ecclesiastical tribunal having jurisdiction of such charges, the courts will recognize such judgments when regularly brought to their notice, and will enjoin the one against whom they were rendered from further acting in the capacity of a minister or a member of the particular church organization, and will enjoin him from excluding from the church building and property a presiding elder of the church, or any of its members in good standing who desire to worship therein. This rule was approved and followed in *Bonacum v. Harrington*, 65 Neb. 831. That case was very like the one at bar. The defendant, Harrington, who was officiating as priest in the parish of Orleans, Nebraska, was expelled by the bishop of Lincoln from the church and from that parish. He refused to surrender the church property, and the bishop brought a suit in equity to restrain him from interfering with said property, and holding possession thereof to the exclusion of the parish priest who had been appointed to succeed him. The district court denied the injunction, but this court on appeal reversed the judgment and remanded the cause, with directions to the district court to enter a decree enjoining the defendant as prayed, and make the injunction perpetual. It will thus be seen

that we have already determined this question adversely to the defendant's contention. We find that this rule is sustained by the great weight of authority in this country, and the objection to the jurisdiction of the district court was properly overruled.

Defendant's second contention is that the district court erred in refusing to dismiss this action. The ground of his motion to dismiss was that the trustees of the parish were not duly notified to attend the meeting which authorized the bringing of this suit. It appears that the business affairs of the plaintiff are controlled and administered by a board of trustees, consisting of the bishop of Lincoln, the vicar-general of the diocese, the rector for the time being of the parish of St. Vincent, and two laymen, whose election must be confirmed by the bishop; that at the meeting called for the purpose of considering the matter of the commencement of this action there were present the bishop of Lincoln, the vicar-general of the diocese by proxy, the Reverend Francis A. O'Brien as rector of the parish, and one of the two laymen who had been regularly elected as a trustee. It also appears that one of the lay trustees was not notified of the meeting because he had withdrawn from the regular church organization and had become one of defendant's adherents. It therefore appears that a majority of the regularly constituted board of trustees was present and took part in the proceedings of the meeting which authorized the commencement of this action. So we are of opinion that the district court properly refused to dismiss the action upon the defendant's application therefor.

We come now to consider the principal or main contention presented by the record. It appears that the bishop of the diocese of Lincoln on several occasions prior to the 22d of January, 1901, cited the defendant to appear before the diocesan curia at Lincoln, which is the ecclesiastical court of the Roman Catholic church having jurisdiction of all matters of church discipline, to show cause why he should not be proceeded against for contumacy and other

violations of the laws, ordinances and regulations of said church; that on each of said occasions the defendant, by letter only, challenged the right of the bishop to preside over said court on the trial of the charges preferred against him, and he alleges that he forthwith prosecuted his challenge and appeal in each of said citations to the sacred congregation of the propaganda fide at Rome. It also appears that the ecclesiastical court proceeded to hear and determine the charges against defendant, and at one time suspended the defendant from the sacred ministry and the performance of each and every ecclesiastical function for the space of one month. It further appears that the defendant was again cited to appear before said ecclesiastical court on the 22d day of January, 1901, to show cause why he should not be excommunicated for his frequently repeated violations of the rules, regulations and laws of the Roman Catholic church, and for contumacy toward the regularly constituted authorities thereof; that said citation contained a full and complete statement of the charges preferred against him; that defendant failed and refused to appear before said court, and again by letter objected to the jurisdiction of the bishop to preside over said court upon the proposed trial, and informed the bishop that he would again renew his challenge and appeal to Rome; that on the said 22d day of January, 1901, the defendant was tried upon the charges thus preferred against him, in his absence, and a decree, judgment or order of said court was rendered against him excommunicating him from the Roman Catholic church and excluding him from the diocese of Lincoln.

It is claimed by the defendant that his so-called appeals to Rome ousted the ecclesiastical court of jurisdiction; that the bishop had no right thereafter to proceed against him; that his appeal is still pending and undetermined; and that therefore he is still entitled to officiate as rector in St. Vincent's parish to the exclusion of the rights of his regularly appointed successor. It is conceded that the diocesan curia had jurisdiction of the subject matter of

St. Vincent's Parish v. Murphy.

the charges preferred against the defendant, and we find in the record sufficient competent evidence to show that whatever appeals the defendant has attempted to prosecute to the propaganda fide at Rome the same have been wholly disregarded, rejected and dismissed by that tribunal. The record thus presents for our consideration a question which we will not attempt to determine. It is sufficient for us to know that the ecclesiastical court of the Roman Catholic church, having jurisdiction over the defendant and of the charges preferred against him, has pronounced upon him a judgment of excommunication and expulsion which deprives him of the right to use or occupy the church property in question.

One of the first cases involving this question was that of *Shannon v. Frost*, 3 B. Mon. (Ky.) 253. In that case two discordant factions of the Baptist church were litigating their respective claims to the use of a house of public worship erected by that church upon ground conveyed in trust for its use and benefit, and it was there said: "This court, having no ecclesiastical jurisdiction, cannot revise or question ordinary acts of church discipline or excision. Our only judicial power in the case arises from the conflicting claims of the parties to the church property and the use of it. And these we must decide as we do all other civil controversies brought to this tribunal for ultimate decision. We cannot decide who ought to be members of the church, nor whether the excommunicated have been justly or unjustly, regularly or irregularly, cut off from the body of the church. We must take the fact of expulsion as conclusive proof that the persons expelled are not now members of the repudiating church; for, whether right or wrong, the act of excommunication must, as to the fact of membership, be law to this court. For every judicial purpose in this case, therefore, we must consider the persons who were expelled by a vote of the church as no longer members of that church, or entitled to any rights or privileges incidental to or resulting from membership therein."

In the case of *Watson v. Jones*, 13 Wall. (U. S.) 679, *Shannon v. Frost*, *supra*, was cited with approval. The case was one growing out of a schism which divided the congregation of a Presbyterian church, and which was brought to the court to determine the right to the use of the property acquired for church purposes. It was said: "In the case of an independent congregation we have pointed out how this identity, or succession, is to be ascertained, but in cases of this character we are bound to look at the fact that the local congregation is itself but a member of a much larger and more important religious organization, and is under its government and control, and is bound by its orders and judgments. There are in the Presbyterian system of ecclesiastical government, in regular succession, the presbytery over the session or local church, the synod over the presbytery, and the general assembly over all. These are called, in the language of the church organs, 'judicatories,' and they entertain appeals from the decisions of those below, and prescribe corrective measures in other cases. In this class of cases we think the rule of action which should govern the civil courts, founded in a broad and sound view of the relations of church and state under our system of laws, and supported by a preponderating weight of judicial authority, is, that, whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them, in their application to the case before them." The rule there announced has been followed in *Chase v. Cheney*, 58 Ill. 509, in *Lutheran Evangelical Church v. Gristgau*, 34 Wis. 328, and by this court in *Pounder v. Ashe*, *supra*, and *Harrington v. Bonacum*, *supra*. We think we should adhere to his rule. It seems to be founded on sound reason, and as become the settled law of this state.

This disposes of all of the defendant's contentions, and

In re Hammond.

we are therefore of the opinion that the judgment of the district court was right, and it is in all things

AFFIRMED.

REESE, C. J., dissents.

IN RE ELMER C. HAMMOND.

IN RE BYRON G. BUTTON.

FILED MARCH 5, 1909. Nos. 16,063, 16,064.

1. **Depositions.** Sections 966 and 967 of the code do not apply to the taking of depositions before justices of the peace, but section 356 *et seq.* control in such matters.
2. **Habeas Corpus: CONTEMPT.** Irregularities in proceedings before justices of the peace committing a recusant witness cannot be reviewed upon habeas corpus. It is only when the proceedings are void that this writ can be of any value.
3. **Constitutional Law: CONSTRUCTION.** The language of the constitution is to be interpreted with reference to the established laws, usages and customs of the country at the time of its adoption, and the course of ordinary and long-settled proceedings according to law.
4. **Depositions: JUSTICE OF THE PEACE: AUTHORITY.** Statutes authorizing justices of the peace to take depositions and to punish persons who disobey subpoenas or refuse to answer proper questions are within the provisions of section 18, art. VI of the constitution, providing that justices of the peace shall "have and exercise such jurisdiction as may be provided by law."
5. ———: **CONTEMPT.** A refusal to answer such improper questions as would constitute abuses of process is not a contempt and may not be punished, and a witness is entitled to his privileges and immunities as well when a deposition is taken as when examined in open court.

ORIGINAL application for a writ of habeas corpus. *Writ denied.*

Flansburg & Williams, for petitioners.

Charles A. Robbins, contra.

LEETON, J.

This is an application for a writ of habeas corpus. The petitioner was detained by virtue of an order of commitment issued by Minor S. Bacon, a justice of the peace in and for Lancaster county, which commanded the keeper of the jail of that county to receive him "and him there safely keep until he shall submit to be sworn and testify and to give his deposition in the case entitled George W. Herr, Plaintiff, v. Button Land Company *et al.*, Defendants, now pending in the district court for Lancaster county, Nebraska."

It appears that a subpoena was served upon the petitioner requiring him to appear and give his deposition in that case on January 19, 1909, before Justice Bacon; that he demanded and was paid his fees for one day's attendance, and that he failed to appear in response to the subpoena, whereupon an attachment was issued by the justice and delivered to a constable, who arrested and brought him before the justice forthwith. He was then requested by the justice to be sworn and testify, but he refused, saying that, acting upon the advice of counsel, he would refuse to be sworn and would refuse to testify in the case. Certain questions were then asked by the attorney for Herr, which the witness refused to answer. By agreement the hearing was adjourned until the next day. Like proceedings were had as to Byron G. Button. On that day an answer was filed, alleging that the taking of the depositions was in bad faith and for the purpose of annoying the defendants in the case and was a mere fishing for testimony; that their testimony was not material nor necessary to the plaintiff's cause of action; that the defendants are residents of Lancaster county, wherein the action is pending; that they have no intention of removing therefrom; that other witnesses were named in the notice to take depositions, but that none of them were examined or sworn; that after the witnesses were arrested and brought before the examining officer, the plaintiff

In re Hammond.

Herr and his attorney abandoned the complaint, charging disobedience to the subpoena, and undertook while they were under arrest to compel the defendants to be sworn and examined under the notice to take depositions, and that the complaint to which this answer is filed is a different complaint and is for a different offense from that for which these defendants were arrested. It is further alleged that the proceeding is void, and in violation of that provision of the federal constitution which provides that no person in a criminal case shall be compelled to be a witness against himself. The record then shows that the witness "having refused to be sworn, and having refused to testify by deposition upon being requested so to do by the court, and the defendant having filed his showing why he should not be punished for contempt, the court finds the defendant Elmer C. Hammond guilty of contempt of court," and judgment was rendered committing him to the county jail, "there to remain until he shall submit to be sworn and testify and to give his deposition in the case." A warrant of commitment was thereupon issued and the petitioner committed to jail.

A number of questions are discussed in the brief of the petitioner. His first contention is that under sections 966 and 967 of the code a justice of the peace has no power to do more than impose a fine of \$5 for refusal to be sworn or to answer questions. We are of the opinion that these sections do not apply to the taking of depositions, but that sections 356 *et seq.* control.

It is next contended that, when a witness is brought before the court by attachment for refusal to obey a subpoena, he can only be tried and punished for that contempt, and that a court has no power to propound questions to him and punish for a refusal to answer the questions. This, however, is the ordinary practice when a trial is in progress, leaving the contempt in refusing to obey the subpoena to be dealt with later, and we see no objections to the practice. The order of procedure is within the court's discretion.

He next contends that the justice of the peace in taking a deposition does not act judicially; that he is a mere ministerial officer, and has no power to adjudge a person guilty of contempt and commit him to jail, and that a law conferring such power violates section 1, art. VI of the constitution of the state. Lastly he urges that a refusal to answer improper and irrelevant questions is not a contempt of court, and that it is an abuse of process to take depositions for the purpose of discovery. Several of the points raised by the petitioner have already been considered by this court, and disposed of adversely to his contentions, in other cases. In *Dogge v. State*, 21 Neb. 272, certain witnesses who had been subpoenaed to appear before a notary public for the purpose of having their depositions taken failed to appear, an attachment was issued, and the witnesses arrested, taken before the notary, and one of them required to be sworn and give testimony, which she refused to do. She was then found guilty of contempt and ordered to be committed to prison until she should consent to testify. It was urged in that case, as in this, that the witness was a resident of Lancaster county capable of being present at the trial, that she had no intention of being absent from the county, that she was an adverse party in the case, and there was no provision of law whereby she could be compelled to testify before the time of the trial. She further contended that the notary public had no power to commit her, for the reason that he had no judicial powers. As to the first point, it was decided that "it was the intention of the legislature, in the enactment of the chapter on evidence, to remove every barrier to discovery of truth, where the parties to the action have equal opportunity to testify. And, where necessary, either party may call the other to testify as to facts exclusively within his knowledge, provided the questions are not privileged." On the second point, it is held that the provisions of section 1, art. VI of the constitution, providing, "The judicial power of the state shall be vested in a supreme court, district courts, county courts, justices of

In re Hammond.

the peace, police magistrates, and in such other courts inferior to the district courts as may be created by law for cities and incorporated towns," do not limit the exercise of all judicial functions to the courts named; that it was not the intention of the framers of the constitution to prevent the exercise of all judicial functions except by these courts; and that since these statutory powers were in existence before the adoption of the constitution they were continued in force by section 4, art. XVI thereof.

In *Courtney v. Knox*, 31 Neb. 652, it was held that a notary had no power to punish a person, not a witness, for contempt in using flagrant and profane language in the presence of the notary and witnesses then present to give testimony, since no such power was conferred by the statute. The conclusion is reached that the notary's powers are limited to the provisions of the statute, and "that he borrows no judicial power, in the taking of depositions, from the dignity of his employment or the necessities of his case." *Olmsted v. Edson*, 71 Neb. 17, was an action against a county judge to recover damages for false imprisonment. The petition alleged that the plaintiffs were husband and wife, and residents of Webster county; that an action was brought against them in the district court for that county; that a notice to take their depositions in that case at the office of the defendant county judge was served on them, and that a subpoena was issued and served requiring them to appear and give testimony. The plaintiffs appeared before the county judge and made known to him that they were residents of Webster county, that they have no intention of absenting themselves therefrom, either temporarily or permanently; that neither of them are either sick, aged or infirm, so as to interfere with them being present and giving testimony at the trial of the case; that the attempt to take their deposition was not in good faith, but for the purpose of harassing and vexing them; that they were husband and wife, and that they each objected on that ground to either of them being sworn or to testify as witnesses, and that they thereupon refused to

give their depositions; that the county judge entered an order finding them guilty of contempt in refusing to give their depositions and committed them to jail, from which they were afterwards discharged by habeas corpus. In the opinion it is said: "The proper and orderly thing for them to have done was to have taken the oath as witnesses and if, by the questions propounded, it appeared that the answers would constitute evidence by the one against the other, to have then made the proper objections which, undoubtedly, would have been sustained. * * * Plaintiffs' contention that such jurisdiction was ousted by a showing that none of the grounds enumerated in section 372 of the code for using the depositions on the trial of the case existed at the time it was sought to take them is untenable. That section is not a limitation on the right to take depositions, but on the right to use them on the trial of the case." *Wehrs v. State*, 132 Ind. 157; *In re Abeles*, 12 Kan. 451.

The facts in *In re Butler*, 76 Neb. 267, were that the petitioner had been imprisoned by a notary for failing and refusing to obey a subpoena requiring him to appear before the notary to take his deposition. Under section 358 of the code the officer can impose no greater punishment than a fine of \$50 for refusing to obey a subpoena, and the court held that since this is the full power given by the statute in such a case the notary had exceeded his power, that his act was void, and the petitioner was illegally held, and he was set at liberty. It was also said that notaries in such matters are not a court and do not exercise judicial functions, but derive their powers solely from the statute. In *DeCamp v. Archibald*, 50 Ohio St. 618, the same contention was made as in this case with reference to the powers of a notary public in committing a witness to jail for refusing to answer questions. The sections of the revised statute of Ohio, which are mentioned in the opinion, contain identical provisions with those of the Nebraska code. The supreme court of Ohio

was of the opinion that the term "judicial power" * * * does not necessarily include the power to hear and determine a matter that is not in the nature of a suit or action between parties. Power to hear and determine matters more or less directly affecting public and private rights is conferred upon and exercised by administrative and executive officers. But this has not been held to affect the validity of statutes by which such powers are conferred"—citing *Dogge v. State*, 21 Neb. 272, *In re Abeles*, 12 Kan. 451, *Ex parte McKee*, 18 Mo. 599, and distinguishing the case of *Kilbourn v. Thompson*, 103 U. S. 168, one of the cases relied on by petitioner.

The supreme court of Kansas at first held in *In re Abeles*, *supra*, that a notary had power to commit for refusal to testify, but in *In re Huron*, 58 Kan. 152, 36 L. R. A. 822, by a divided court it overruled that case and held that the statute purporting to confer such power is invalid. The opinion announcing this conclusion is written by Johnston, J., in opposition to his own views, which are also stated, and which are in line with *Dogge v. State*, *supra*. In a note to *Farnham v. Colman*, 1 L. R. A. (n. s.) 1135 (19 S. Dak. 342), a number of cases are collated, and it is shown that at common law only courts of record had power to punish for contempt, and that the power of a justice of the peace to punish a witness for contempt for refusing to be sworn and refusing to testify had its origin in a statute of Philip and Mary. The practice has long been followed in this country under authority of statutes. The power has its source in the statute and exists no further than thus granted. This is the point really decided in *In re Kerrigan*, 33 N. J. Law, 344, cited by petitioner, where a recorder was held to have no general power to punish for contempt, not being a court of record, and that magistrates and others empowered to act in a summary way must act within the powers specially conferred. While admitting the persuasiveness of an opinion by a court of the standing of the courts of New York, we believe that under the laws and constitution of this state we

must decline to follow *People v. Leubischer*, 34 App. Div. (N. Y.) 577, if inconsistent with the views expressed here, though as to this we are somewhat doubtful when the whole opinion is examined. The gist of that case seems to be that a commissioner of the court of another state is not an officer empowered to imprison for contempt, and is not an officer connected with the administration of justice in New York state.

If the language of the constitution were to be construed as strictly as petitioner contends, no judicial powers or functions could be exercised by a judge at chambers or by a county judge, except when in session as a court, for "district courts" and "county courts" alone are mentioned in the section which he quotes. But the words of the constitution are to be interpreted with reference to the established laws, usages and customs of the country at the time of its adoption, and the course of ordinary and long-settled proceedings according to law. Whether the special power given by statute to fine or imprison recalcitrant witnesses is the exercise of a judicial function or of judicial power we think really is merely a matter of academic definition. The point to determine is: Does it violate any provision of the fundamental law? It is one of the long-established means or instrumentalities adopted to aid in securing justice, and must have been in the minds of the makers of the constitution as much as the fact that much of the action of a county judge or of a district judge in chambers is of a judicial nature. *DeCamp v. Archibald*, 50 Ohio St. 618. But, in any event, section 18, art. VI of the constitution, provides that justices of the peace "shall have and exercise such jurisdiction as may be provided by law." The power to take depositions and commit for refusal to testify is expressly conferred by statute. We think that, construing the two sections together, there is no constitutional restriction upon the legislative right to enact the statute or upon the officer to exercise the power. The language of this section is as broad as of that giving judges of courts of record

In re Hammond.

such jurisdiction as may be provided by law. Constitution, art. VI, sec. 23.

The petitioner complains that the taking of the deposition is not in good faith, and that the questions asked him would require the disclosure of his private business. The record does not disclose that this has been attempted, but, even if it were, it might be proper under the issues, of the nature of which we are not informed. If it should be sought to perpetrate a wrong or to abuse the process of the court or officer clearly for an unjustifiable purpose, we think the witness might lawfully refuse to answer, but this question is not presented here, since the petitioner refused to be sworn or to testify at all. While objections to testimony cannot be ruled upon by the officer, yet it cannot be permitted that a witness may be compelled to answer questions seeking to elicit matters which the determination of the issues of the case did not require, or which pertain to his private business or affairs, and are not proper subjects of inquiry in the case. A commitment of a witness for properly protecting himself from an illegal inquisition would not be upheld. But a refusal to be sworn may properly be punished, as may also a refusal to answer proper interrogatories. *Ex parte Jennings*, 60 Ohio St. 319; *Ex parte Schoepf*, 74 Ohio St. 1; *Ex parte Mallinkrodt*, 20 Mo. 493; *Ex parte Krieger*, 7 Mo. App. 367; *Ex parte Abbott*, 7 Okla. 78. In the case *In re Davis*, 38 Kan. 408, and in *In re Cubberly*, 39 Kan. 291, decided while the rule of the *Abeles* case was the law of that state, it is held that an officer has no power to commit a witness for refusal to give a deposition, when it appears that it is not taken in good faith, but merely to harass and annoy the adverse party or to fish out evidence in advance of the trial. In this state a speedy remedy for the abuse of the power granted is conferred by section 359 of the code, which provides that a witness imprisoned by an officer before whom his deposition is being taken may apply to a judge of the supreme court, district court or probate court, who shall have power to discharge him

if it appear that his imprisonment is illegal. This affords a summary method of review by a judicial officer, and by another section of the statute such power may be exercised at chambers. A refusal to answer such questions as would constitute abuse of process is not a contempt and may not be punished, and a witness is entitled to his privileges and immunities as well when a deposition is taken as when examined in open court.

Under the facts shown in the record, the justice had the right to issue the subpoena to compel the petitioner to appear. On his refusal he had a right to issue an attachment and have him brought into his presence at the time and place specified in the notice to take depositions. He then had a right to request him to be sworn, and upon his contumacious refusal so to do the statute expressly gave him the power to imprison him until he would comply with the order of the court.

The petitioner seems to be held under a lawful commitment, and the writ is therefore

DENIED.

SECOND NATIONAL BANK, APPELLEE, V. SNOQUALMIE TRUST
COMPANY, APPELLANT.

FILED MARCH 5, 1909. No. 15,508.

1. Notes: BONA FIDE PURCHASERS. Defendant's board of directors, by resolution, authorized the execution of the corporation's note to D., its president. The note was prepared and signed in the corporation name by the secretary alone and delivered to D. The instrument did not indicate that D. was interested in, or an officer of, defendant. D. secured said note by misrepresentations and could not have recovered thereon. The contents of defendant's articles of incorporation were not disclosed, and but two sections of its by-laws were introduced in evidence, and they do not specifically authorize any officer or officers of the corporation to execute its promissory note. Before maturity, in due course of trade, for value and without notice, other than the face of the instrument would import, plaintiff purchased said note in

Second Nat. Bank v. Snoqualmie Trust Co.

good faith from D.'s indorsee. *Held*, That it was not void in plaintiff's hands.

2. —: —. "An indorsee of a negotiable instrument, who takes it before maturity in part payment of a preexisting debt, and credits it thereon, is a purchaser for value in the due course of business." *Smith v. Thompson*, 67 Neb. 527.
3. Trial: DIRECTING VERDICT. The evidence is undisputed that plaintiff purchased the note in suit in good faith, in due course of trade, before its maturity, for a valuable consideration, and without notice of any infirmities therein. *Held*, That the court properly instructed the jury to return a verdict for plaintiff.

APPEAL from the district court for Lancaster county:
LINCOLN FROST, JUDGE. *Affirmed*.

M. F. Harrington, T. J. Doyle and G. L. De Lacy, for appellant.

Burkett, Wilson & Brown, contra.

ROOT, J.

Action by the indorsee of a promissory note. The district court directed a verdict for plaintiff, and defendant appeals.

1. Prior to 1905 defendant was organized as a corporation under the laws of Arizona. Its articles of incorporation were not introduced in evidence, but the secretary testified that it was formed for the purpose of financing a mining enterprise whose property was situated in Washington. L. M. Disney was interested in, and vice-president of, the mining company, and president of defendant. T. J. Doyle was secretary of the trust company, which maintained offices in Lincoln, Nebraska. Disney had made a claim against defendant for salary or commissions for something he had, or claimed to have, done in its interests, and also offered to sell it certain stock of the mining company that was in fact owned by defendant. April 13, 1905, the defendant's board of directors passed the following resolution: "It was moved and carried that the proposition of L. M. Disney to sell this company

6,000 shares of mining stock for fifteen hundred dollars, he releasing all claim for salary, except expenses, and charges prior to January 1, 1905, be accepted, that he be paid five hundred dollars, and the remainder of one thousand dollars be paid him July 1, 1905, and that a note be given for the same bearing interest at the rate of six per cent." Thereupon the instrument in suit was executed. It is as follows: "\$1,000. Lincoln, Neb., April 14, 1905. On or before July 1 after date we promise to pay to the order of L. M. Disney one thousand and no-100 dollars, at Lincoln, Neb. (Signed) Snoqualmie Trust Co., By T. J. Doyle, Sec." Defendant's seal was stamped upon the writing. This instrument was transferred by indorsement to the payee's wife, and by her sold and indorsed to plaintiff on the 19th of April, 1905. The mining stock transferred by Disney as aforesaid actually belonged to the corporation, so that, independent of the release of Disney's claim for salary or commission, there was no consideration for the instrument, and it was procured by the misrepresentation of the payee. Defendant alleged that under the laws of Arizona and of Nebraska, and by virtue of its articles of incorporation and by-laws, its president only, or, in case of his disability, the vice-president, had authority to execute said note; that the note had never been executed by it and was not its obligation; that the impression of defendant's seal thereon was a forgery imprinted by said Disney after the instrument was signed, and constituted a material change thereof. That plaintiff had notice of the facts and was not an innocent purchaser. Mr. Disney's testimony was not offered.

2. Neither the laws of Arizona nor defendant's articles of incorporation were introduced in evidence, and but two sections of its by-laws, those relating to the duties of the president and secretary. Neither officer is in terms authorized to execute promissory notes on defendant's account or in its name. The president is vested with power to sign warrants on the treasurer for the payment of money, to sign deeds of conveyance, and to discharge such

other duties as are ordinarily and usually performed by the president of a private corporation. The secretary is made the custodian of the corporate seal. So far as the record discloses, none of the officers, nor all combined, were specifically authorized to execute a negotiable instrument in its name. However, the power to contract necessarily involves the power to create a debt, and, as said by Mr. Justice Gordon in *Watt's Appeal*, 78 Pa. St. 370, 391: "A corporation, without such power would be a body without life, utterly effete and worthless." *Richmond, F. & P. R. Co. v. Sncad & Smith*, 19 Grat. (Va.) 354, 100 Am. Dec. 670. And the record being silent as to the agencies provided by defendant for the exercise of this very essential function, we must look to the facts in the particular instance unenlightened by information concerning its usual course of business in such transactions. The seal to which so much importance is attached by defendant is not controlling, because its use was not necessary to constitute the instrument the obligation of defendant. *Crowley v. Genesee Mining Co.*, 55 Cal. 273. Nor does defendant plead that the seal was attached after the instrument was delivered, but "after the signing of said note," a proper time for such an act. Mr. Doyle the secretary, did testify that he did not stamp the corporate seal on the paper, and that he does not know how, when or where such impression was made, but there is absolutely no proof that the payee is responsible for what was done in this regard; nor does it appear that the vice-president or some director of defendant did not perform that act. The board of directors had authorized the execution of the note, and in August following, after they had discovered Disney's fraud, a meeting was held in Mr. Doyle's office, and a lengthy resolution adopted, wherein it was determined to repudiate the note in suit, not because it was executed without authority, but for the reason that defendant had never received any consideration therefor. *Prima facie* at least the note was the obligation of the corporation. *Reeve v. First Nat. Bank*, 54 N. J.

Soucek v. Karr.

Law, 208, 33 Am. St. Rep. 675; *Merchants Nat. Bank v. Citizens Gas Light Co.*, 159 Mass. 505, 38 Am. St. Rep. 453; Joyce, Defenses to Commercial Paper, sec. 80.

3. Defendant urges that plaintiff is not a *bona fide* holder of the note sued on. The wife of the payee was related to several of the stockholders and some of the officers of plaintiff. She had a separate estate which she managed, and was indebted to plaintiff on her promissory note for \$5,500. She indorsed the note in suit and delivered it to plaintiff and received a credit of \$1,000 on her obligation to the bank. The cashier, with whom, so far as the record discloses, she dealt exclusively concerning this transaction, testified positively that he did not know that L. M. Disney was interested in, or an officer of, defendant; that he did not know of any defense to the note and took it for the bank in good faith; that he was told that the note had been made for salary or commission. The credit on Mrs. Disney's obligation was the payment of a valuable consideration by plaintiff. *Martin v. Johnston*, 34 Neb. 797; *Jones v. Wiesen*, 50 Neb. 243; *Smith v. Thompson*, 67 Neb. 527. There is nothing in the record to contradict or render improbable this testimony, and plaintiff was entitled to the instruction given by the court. *Stedman v. Rochester Loan & Banking Co.*, 42 Neb. 641.

The judgment of the district court is therefore

AFFIRMED.

CHRISTIANA SOUCHEK, APPELLLEE, v. ERNEST KARR,
APPELLANT.

FILED MARCH 5, 1909. No. 15,744.

1. **Evidence Taken on Former Trial.** The official reporter testified that a bill of exceptions of the evidence submitted during a former trial of the case correctly reproduced the testimony of the witnesses. It also appeared that some of those witnesses were non-residents of and absent from the county during the succeeding

Soucek v. Karr.

trial, and that plaintiff had been unable to secure their depositions or presence. *Held*, That it was not error to permit the testimony of such absent witnesses to be read from the bill of exceptions to the jury.

2. **Appeal: HARMLESS ERROR: COMMENTS OF JUDGE.** The trial court in response to an objection to a question propounded to a witness stated that, while he was satisfied upon principle that the witness was not sufficiently informed upon the subject to testify thereto, yet, in deference to a possible construction of the opinion of this court upon a former appeal, he would overrule the objection. *Held*, That, as the point upon which the witness was then interrogated was established without dispute by witnesses for both plaintiff and defendant, the remarks of the court were not prejudicially erroneous, and did not have a tendency to destroy the credibility of the witness concerning her other testimony.
3. **Trial: INSTRUCTIONS.** It is not error to refuse to give an instruction that singles out a witness and informs the jury that she is competent to testify upon a given subject.
4. **Appeal: EVIDENCE.** If a case has been tried three times, the verdict each time being in favor of plaintiff, this court will not set aside the last verdict as being against the weight of the evidence, unless the evidence is clearly insufficient to support the verdict.

APPEAL from the district court for Seward county:
ARTHUR J. EVANS, JUDGE. *Affirmed.*

R. D. Sutherland, S. A. Searle and M. D. Carey, for appellant.

R. S. Norval and J. J. Thomas, contra.

Root, J.

Defendant has appealed to this court from a judgment of filiation. A like judgment was reversed on a former appeal. 78 Neb. 488.

1. Defendant argues that the district court erred in permitting the official reporter to read to the jury from a bill of exceptions the testimony of three witnesses given on a former trial of this case. It was admitted in open court when the case was tried that the witnesses were then nonresidents of Seward county and absent there-

from. It was further shown that plaintiff was without means to secure the depositions of those witnesses or their attendance at court. The official reporter testified that he had correctly reported the testimony of said witnesses, given on the former trial, and accurately transcribed it into a bill of exceptions, which had been settled and allowed by the clerk of the court in accordance with a stipulation signed by attorneys for the respective parties, and thereupon said testimony was read on behalf of plaintiff. In *Omaha Street R. Co. v. Elkins*, 39 Neb. 480, it was determined that testimony preserved in a bill of exceptions was competent, and, under certain conditions, admissible upon a subsequent trial. *Smith v. State*, 42 Neb. 356, cited by defendant, merely holds that the certificate of a reporter to a transcript of his notes is not a sufficient foundation to admit that transcript in evidence. *Pike v. Hauptman*, ante, p. 172; *Vandewege v. Peter*, ante, p. 140. It is not suggested that the testimony is incorrect, and we are of opinion that it was properly admitted.

2. Upon a former trial of this case the district court refused to permit a professional nurse, Miss Kealing, who attended plaintiff in childbirth, to testify as to the average period of gestation, and that plaintiff's child when born had the appearance of a fully developed nine months' child. The facts are material because plaintiff's association with defendant was such as to preclude the finding of his guilt if conception had occurred nine months preceding the child's birth. On the first appeal to this court we held that Miss Kealing was competent to testify upon said points, but the syllabus does not refer to the competency of the witness to testify to the period of gestation. Upon the last trial the court permitted the nurse to testify upon both subjects; but, referring solely to a question concerning the average length of gestation, the trial judge stated in open court that upon principle it was perfectly clear to him that the witness was not competent to testify, but, in deference to what was written in the body of the former opinion in this case, he would overrule the objection.

Hart v. Chicago & Northwestern R. Co.

Defendant excepted to the judge's remarks as tending to destroy the weight of the witness's testimony. All objections to the other questions propounded to the witness were promptly overruled by the court. Upon the question of the average period of gestation the evidence is not conflicting. The nurse agreed with the physicians called for each side, and we are of opinion that the case should not be reversed for those remarks of the trial judge.

3. Nor did the court err in refusing to give an instruction that the nurse was competent to testify. By admitting that testimony the court decided that it was competent, and its weight was for the jurors, and they were properly instructed upon this point.

4. It is argued that the verdict is not sustained by the evidence. We have read the bill of exceptions, and find the evidence in sharp conflict on many material points, but there is evidence tending to prove every material allegation in the complaint. Three verdicts have been returned in favor of plaintiff, and two motions for a new trial have been overruled. The verdict is not clearly wrong, and ought not to be set aside. *Dunbar v. Briggs*, 18 Neb. 94; *Missouri P. R. Co. v. Fox*, 60 Neb. 531; *Brownell & Co. v. Fuller*, 60 Neb. 558; *Heidemann v. Noxon*, ante, p. 175.

The judgment of the district court therefore is

AFFIRMED.

FAWCETT, J., I am so thoroughly impressed by the evidence that the defendant is not guilty that I cannot concur.

JUNE W. HART, APPELLEE, v. CHICAGO & NORTHWESTERN RAILWAY COMPANY, APPELLANT.

FILED MARCH 5, 1909. No 15,495.

1. Appeal: EXCEPTIONS. An instruction to which there is no exception is not reviewable.

2. **Damages: DESTRUCTION OF TREES.** In a suit to recover damages to timber injured by fire, the court may decline to instruct the jury that the measure of damages is the difference in value of plaintiff's land before and after the fire, where the trees have a value separate from the land.
3. **Evidence: VALUE OF TREES.** In an action to recover damages to timber injured by fire, a competent witness for plaintiff may testify to the number of trees destroyed and the difference in their value before and after the fire.

APPEAL from the district court for Holt county: WILLIAM H. WESTOVER, JUDGE. *Affirmed.*

B. T. White, C. C. Wright and B. H. Dunham, for appellant.

M. F. Harrington and R. M. Johnson, contra.

ROSE, J.

Sparks from defendant's engine started a fire which burnt over a quarter-section of land owned by plaintiff in Holt county, and she brought this suit to recover resulting damages in the sum of \$2,000 to her land, grass and a ten-acre grove of trees. The answer was in effect a general denial. In open court defendant admitted responsibility for the fire. The amount of damages was the only issue tried, and the jury returned a verdict in favor of plaintiff for \$350. From a judgment in her favor for that sum defendant appeals.

The trial court instructed the jury to the effect that the measure of damages to the trees was the value thereof "with reference to the land in the situation in which they stood prior to the damage, less their value for practical purposes afterwards." Defendant assails this instruction on the ground that it does not correctly state the measure of damages. It is also criticized on the ground that it authorizes a double recovery. Consideration of this instruction is unnecessary. When given, there was no exception to it in the district court. It was therefore satis-

factory to defendant at the time the case was submitted to the jury, and cannot be urged now as a ground for setting aside an adverse finding.

Complaint is also made of the failure of the trial court to instruct the jury that the measure of damages was the difference in the value of the land before and after the fire, in the event of a finding that the trees were of no value except to increase the selling price or value of the farm. Defendant requested a series of instructions applicable to the rule stated, which the trial court declined to give. The doctrine invoked by defendant and announced in the rejected instructions is not without support in reason and is an established rule in the courts of many jurisdictions, but the instructions requested on this issue and refused by the trial court are not in harmony with the former holdings of this court. *Fremont, E. & M. V. R. Co. v. Crum*, 30 Neb. 70; *Kansas City & O. R. Co. v. Rogers*, 48 Neb. 653; *Missouri P. R. Co. v. Tipton*, 61 Neb. 49; *Alberts v. Husenetter*, 77 Neb. 699. The rule was recently stated as follows: "The measure of damages to growing trees, having no value for purposes of transplanting, is the value of the trees with reference to the land in the situation in which they stood prior to the damage, less their value for practical purposes afterwards." *Union P. R. Co. v. Murphy*, 76 Neb. 545. There is authority for holding that this rule is general in its application to trees destroyed by fire. In *Missouri P. R. Co. v. Tipton*, 61 Neb. 49, this court, in an opinion by Judge HOLCOMB, said: "We think this court is committed to the doctrine that a recovery may be had under evidence showing the value of fruit trees, shade or ornamental trees, or young growing timber, as they stood as live, growing trees before the injury complained of, and their value, if any, immediately thereafter."

The doctrine applies to artificial groves as well as to natural timber. *Kansas City & O. R. Co. v. Rogers, supra*. Defendant insists, however, that plaintiff's trees were cottonwood of no value except to "increase the selling

price of the land and its value as a farm," and that there was no competent evidence of the value of the timber for any other purpose. This is urged as a distinguishing feature which required the application of the rule stated in the rejected instructions to the effect that the measure of damages was the difference in the value of the land before and after the fire. Defendant showed by its own witnesses that the trees had a value of their own. One witness, after testifying he had counted the trees destroyed, was asked: "What would you say a tree the size of the largest you said was there would be worth for fence posts, standing there?" The answer was: "Be worth about five cents." Another witness who had counted and described the trees was asked, in testifying on behalf of defendant: "What would you say the amount of the injury to that grove was as you found it out there?" To this he answered: "Well, I don't know. I placed the injury right around \$50." This same witness testified that, if he were buying the land, he would not make any difference in the price on account of its having been burnt over. Defendant thus disproved the distinguishing feature upon which it relies for the adoption of the rule suggested in the rejected instructions and is bound by its own proof. It follows that the district court did not err in refusing to give the instructions requested by defendant.

Defendant's concluding argument is directed to the point that one of the witnesses for plaintiff did not show himself competent to testify to the value of the trees and assumed a false basis in estimating damages. In substance he testified he had known plaintiff's land, had seen the grove 18 years ago, when it was his father's timber claim, was with his father when the latter was working on the trees, which had been cultivated several years. The land had been purchased by plaintiff four or five years ago, when the grove was in excellent condition. He had trimmed the trees, and cut the brush and dead trees in 1904. The grove had been injured by fire in 1905. He counted 3,500 trees killed by the fire, knew the fair value

State v. Brandt.

of trees like these, when they were burned. The trees were ornamental, furnished shade and posts. He could use them for lots of things. The trees were worth nothing after the fire, and were worth at least 50 cents a tree at the time they were burned. Testimony of this character to establish damage to trees injured by fire has been approved by this court, and there was no prejudicial error in admitting it. *Fremont, E. & M. V. R. Co. v. Crum, supra; Kansas City & O. R. Co. v. Rogers, supra; Alberts v. Husenetter, supra.*

No error appearing in the record, the judgment of the district court is

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. GEORGE BRANDT,
APPELLANT.*

FILED MARCH 5, 1909. No. 15,565.

1. **Intoxicating Liquors: VIOLATION OF ORDINANCES: APPEAL.** A saloon-keeper who has been fined by the police court for keeping his place of business open after hours or on Sunday, in violation of an ordinance of the city of Hastings, cannot appeal to the district court under the provisions of section 324 of the criminal code, relating to appeals from judgments rendered by magistrates in imposing fines or imprisonment for violations of statutes of the state.
2. **Constitutional Law.** A party to a suit will not ordinarily be permitted to attack the constitutionality of a statute in a case where his rights or interests are not invaded or affected by its provisions.

APPEAL from the district court for Adams county: ED
L. ADAMS, JUDGE. *Affirmed.*

John C. Stevens, for appellant.

W. F. Button, contra.

* See *Brandt v. State*, 80 Neb. 843.

ROSE, J.

When defendant was a licensed saloon-keeper in the city of Hastings, he kept his place of business open "after hours, or on Sunday, September 29, 1907," in violation of a city ordinance. For this offense the police judge fined him \$50 and costs, with the alternative of payment or imprisonment. He attempted to appeal to the the district court, but failed to comply with a provision of the Hastings charter, declaring that no appeal by defendant shall be allowed in any case arising under a city ordinance, unless a recognizance to pay the fine and costs is given by him within ten days. Comp. St. 1907, ch. 13, art. III, sec. 101. Failure to give the recognizance required by the charter resulted in a dismissal of the appeal for want of jurisdiction when the case reached the district court, and from that order defendant has appealed to this court.

Defendant admits he did not give the recognizance required by the city charter, but argues that the requirement is void, because it conflicts with the constitutional provision on the subject of uniformity of laws relating to courts. Constitution, art. VI, sec. 19. He further insists that the offense of which he was accused and convicted was a violation of the statute, declaring that every person who shall sell or give away any malt, spirituous or vinous liquors on Sunday shall forfeit for every offense \$100. Comp. St. 1907, ch. 50, sec. 14. He also asserts that he appealed from the conviction under the statute cited and gave a recognizance in strict conformity with the requirements of section 324 of the criminal code, relating to appeals from judgments rendered by magistrates in imposing fines or imprisonment for misdemeanors denounced by statutes of the state. Under that appeal and recognizance defendant argues that the district court acquired jurisdiction and erroneously entered the order of dismissal herein assailed. This position cannot be maintained for the reason his offense was denounced only by

Wally v. Union P. R. Co.

the city ordinance and is not punishable under any provision of the criminal code. The question has already been settled in this case. In *Brandt v. State*, 80 Neb. 843, this court, in an opinion by Judge LERTON, said: "The offense with which Brandt was charged was not a violation of any criminal law of this state, but of a local regulation or ordinance of the city of Hastings." The statute under which defendant attempted to give his recognizance did not apply to the offense of which he was convicted in the police court, and his appeal conferred no jurisdiction on the district court. It is manifest, therefore, if that part of the city charter which requires defendant to give a recognizance to pay the fine and costs as a condition of appeal were declared unconstitutional and void, the district court would still be without jurisdiction. This conclusion makes it unnecessary to examine the constitutional question presented by counsel for defendant, though it was ably argued at the bar and in his brief. The rule is that a party to a suit will not ordinarily be permitted to attack the constitutionality of a statute in a case where his rights or interests are not invaded or affected by its provisions. *State v. Stevenson*, 18 Neb. 416; 8 Cyc. 787.

There is no error in the judgment of the district court, and it is

AFFIRMED.

ELIZABETH WALLY, ADMINISTRATRIX, APPELLEE, v. UNION
PACIFIC RAILROAD COMPANY, APPELLANT.

FILED MARCH 5, 1909. No. 15,585.

1. Instructions examined, and held to have properly submitted the issues in controversy to the jury.
2. Evidence examined, and held sufficient to sustain the verdict of the jury and judgment of the court.

APPEAL from the district court for Douglas county:
GEORGE A. DAY, JUDGE. *Affirmed.*

N. H. Loomis, Edson Rich and James E. Rait, for appellant.

James C. Kinsler, contra.

FAWCETT, J.

This action was brought against the defendant and the Omaha & Council Bluffs Street Railway Company, by plaintiff as administratrix of the estate of John Wally, deceased, to recover damages sustained by his widow as a result of his death, which plaintiff alleged was wrongfully and negligently caused by defendants on the night of September 11, 1906. At the conclusion of plaintiff's case, the court directed a verdict in favor of the defendant Omaha & Council Bluffs Street Railway Company, and the case proceeded to trial against the other defendant, appellant here. Plaintiff's intestate was a motorman in the employ of the street railway company, and at the time of the accident which caused his death was operating a motor car on the Thirteenth street line of that company in the city of Omaha. Thirteenth street runs north and south, and at the point of the accident is occupied by two tracks of the street railway company, the north bound track being on the east side of the street. Jones and Leavenworth streets run east and west, and cross Thirteenth street at right angles. Midway between Jones and Leavenworth streets there is an alley running east and west, which also crosses Thirteenth street at right angles. The defendant has a spur or loading track on this alley which crosses Thirteenth street on grade. The east end of this spur track is connected with the main track of defendant at a point about four blocks east of Thirteenth street, while the west end ends abruptly at the east side of Fourteenth street, a trifle less than one block west of the center of Thirteenth street. At the time of the accident, which was on what is shown to have been a dark night, plaintiff's intestate was proceeding

with his car northward on the east track, when just as he was about to cross the spur track of defendant, his car was run down by a train of defendant's freight cars which were being backed westwardly along the alley. The result of the collision was the death of plaintiff's intestate and one of the passengers in his car. The jury returned a verdict in favor of plaintiff for \$5,000, upon which judgment was rendered. Defendant appeals.

Defendant bases its claim for a reversal upon two grounds: "(1) For the reason that the court below should have directed a verdict for the defendant because the undisputed testimony showed that the plaintiff's intestate by his own carelessness and negligence contributed to his injury and death. (2) For the reason that, even though the questions involved were for a jury to determine, the court erred in submitting to the jury the second theory in the plaintiff's petition because the facts in this case wholly fail to make the case one within such a theory, and the instruction given by the court was erroneous, inapplicable, confusing and misleading, and deprived the defendant of a fair submission to the jury of any question which was proper for the jury to determine."

Plaintiff's second theory, referred to in defendant's second assignment of error, is that the defendant with the exercise of ordinary and reasonable care could and would have seen the perilous situation in which plaintiff's intestate was placed in time to have avoided the collision and injury, but that, "instead of so doing, the defendant railroad company and its agents and employees in charge of said engine and train carelessly, negligently and recklessly continued to propel said engine and train out through the dark alley on the east side of Thirteenth street, as aforesaid, toward said intersection and toward and against the car upon which said John Wally was employed, as aforesaid, and thereby carelessly and negligently caused the injuries and death of said John Wally." The law as to negligence, contributory negligence, and the liability of a railroad company for injury to one who

negligently exposes himself to danger by being upon or in close proximity to its tracks, and who is evidently oblivious of his danger, where by the exercise of reasonable care the agents of the company in charge of its train could and would see the dangerous situation of such person in time to stop its engine and avoid the injury, is now so well settled in this court as to not require a further citation of cases or discussion of those questions.

We have carefully examined the evidence introduced upon the trial of the case, and find that it fully justified the trial court in submitting all three of the questions referred to to the jury. The testimony as to the rate of speed at which plaintiff's intestate approached the intersection is conflicting, but to our minds preponderates in favor of plaintiff's contention that at such time the motor car was not proceeding at a greater rate of speed than four miles an hour. It was proceeding so slowly at the time that a passenger riding upon the rear platform of the car, who suddenly saw the freight car about to come in contact with the motor car, jumped from the car without difficulty or accident. The uncontradicted evidence shows that the head light of the motor car was burning brightly. The testimony as to whether or not there were any lights upon the freight car of the defendant is conflicting. The employee of the defendant who was in charge of the backing freight train testified that he was upon the rear end of the freight car with a lighted lantern in his hand; that their train was traveling at a speed of about four miles an hour; that, when he saw the approaching motor car and discovered that a collision was imminent, he signalled the engineer to stop the train; that he gave such signal with his lantern when that part of the car upon which he was standing was over the curb on the east side of Thirteenth street; that he then ran back over the length of his car, a distance of 34 feet, went down over the end of that car, and fell off in the alley. Plaintiff argues that this testimony is untrue; that the car upon which the witness was riding had not at that time

reached the curb on the east side of Thirteenth street, but was a considerable distance east of that point, and directs attention to the record which shows that, notwithstanding the fact that his train was running west at the rate of four miles an hour, after he had run east along the top of his car 34 feet, and fell off, the point where he fell was 20 feet east of the east line of the sidewalk, which, considering the width of the sidewalk, would make it at least 24 to 26 feet east of the curb on the east side of Thirteenth street. The testimony of this witness, together with that of others introduced by defendant to show that there were lanterns on the rear end of the freight train, is met by the positive testimony of the conductor of the motor car and passengers on the car that there were no lights upon the freight car, that the engineer was not ringing the bell or blowing the whistle, and that there was nothing to indicate the approach of the freight car until it had entered upon Thirteenth street and was within a very few feet of the motor car. We do not see how any good purpose could be served by further quoting the testimony on this branch of the case. It was, to say the least, conflicting, and warranted the submission of the case to the jury. From it the jury might well find that, if defendant's employees had been keeping even a slight lookout, they would have seen the glare of the headlight of the motor car in ample time to have stopped their train and to have avoided the unfortunate collision which their negligence caused.

In the light of what we have above said and of the statement made by counsel for defendant in their brief, we do not deem it necessary to enter into an extended consideration or discussion of the instructions given by the court. Counsel set out the instructions in full, and then say: "The foregoing instructions, if the case were a proper one for the jury to determine, would clearly and fairly submit the question to the jury were it not for the conflicting provisos and qualifications attached to each instruction." The provisos referred to appear at the end

of instructions 5, 6, 8, 10 and 11, and are as follows: "Unless you find for the plaintiff upon the second theory of plaintiff's petition." By the ninth instruction the court fairly advised the jury as to this theory. We have carefully examined the instruction, and, while it does not appear to have been drawn with the customary precision and clearness of the learned judge who gave it, we cannot say that it was prejudicially erroneous.

A careful examination of the entire record satisfies us that the case was fairly and properly submitted to the jury upon sufficient evidence to warrant such submission, and that there is ample evidence in the record to sustain the verdict of the jury and judgment of the court. Finding no error in the record, the judgment of the district court is

AFFIRMED.

WILMOT Z. EMERSON V. STATE OF NEBRASKA.

FILED MARCH 5, 1909. No. 16,004.

Larceny: INSTRUCTIONS. E. was charged with the crime of stealing property in A county over the value of \$100. Upon the theory of the state that said property was feloniously obtained by the accused in C. county and from thence brought into S. county and there sold by the defendant, the court gave the following instruction: "Should you believe from the evidence that the mules described in the information were wont to run upon a range or in a pasture in Cherry county, Nebraska, and if you further believe from all the facts and circumstances in evidence that the said mules were taken from the range in said Cherry county, and if you further believe from the evidence that said mules were brought into Sheridan county by the defendant, and sold by him in Sheridan county, then the crime charged in the information would be complete in Sheridan county." Held prejudicial to the rights of the accused and erroneous.

ERROR to the district court for Sheridan county: WILLIAM H. WESTOVER, JUDGE. Reversed.

William Mitchell, R. L. Wilhite and Harrison & Prince,
for plaintiff in error.

William T. Thompson, Attorney General, and George
W. Ayres, contra.

DEAN, J.

Wilmot Z. Emerson, hereinafter called defendant, was convicted in Sheridan county of unlawfully and feloniously stealing, taking and driving away on or about December 20, 1907, in said Sheridan county, two mules of the value of \$200, the property of one William O'Toole, with the unlawful and felonious intent of converting the said property to his own use and without the consent of the owner. The defendant was sentenced to serve a term of five years in the penitentiary, and prosecutes error to this court.

Following is a synopsis of only so much of the record as is necessary to obtain an understanding of one of the assignments of error relied on by defendant and discussed in the opinion: The proof shows that William O'Toole was on the date of the alleged offense, and for several years prior thereto had been, a resident ranchman of Cherry county and an owner of and dealer in horses and mules which he kept for sale upon his ranch in said county, and that the defendant was at said time, and for about two years prior thereto had been, a farmer residing in Sheridan county about 40 miles from the O'Toole ranch; that the animals described in the information were always the property of O'Toole, and on or about one week prior to said December 20 were in his possession upon said ranch in Cherry county, and disappeared therefrom between December 13 and 21, 1907, without the said owner's knowledge or consent; that on or about January 1, 1908, the said animals were by the defendant sold and delivered in Sheridan county to his nearest neighbor, one Robert Patton, for about their value, and kept by Patton on his farm in Deuel county, about four miles distant

from defendant's place, until some time in March, 1908, when O'Toole discovered the whereabouts of his property, and, asserting ownership, obtained possession thereof from Patton. The case was apparently prosecuted by the state on the theory that defendant had stolen the animals in Cherry county, and, having thereafter brought them into Sheridan county, there sold them. For the purpose of this review, the case at bar turns upon an instruction evidently given by the court upon this theory.

Counsel for defendant in oral argument and in their brief recognize and take no exception to the familiar rule of law, which holds in substance that property stolen in one county and by the wrongdoer taken into another county constitutes a continuing offense against the common sovereignty, the state, and that the accused may properly be prosecuted in either county or in any county within the sovereignty into which he may take the stolen goods. *Hurlburt v. State*, 52 Neb. 428; *State v. Smith*, 66 Mo. 61; *Stinson v. People*, 43 Ill. 397; 1 McClain, Criminal Law, sec. 552. But, while admitting the rule, defendant's counsel contend the trial court, evidently having this principle of law in mind, and with the intention of incorporating it in the instructions to the jury, erred in giving instruction numbered 4, and assigns the giving of said instruction, among other alleged errors occurring at the trial, as ground for reversal of the judgment. The instruction complained of is in the following language: "Should you believe from the evidence that the mules described in the information were wont to run upon a range or in a pasture in Cherry county, Nebraska, and if you further believe from all the facts and circumstances in evidence that the said mules were taken from the range in said Cherry county, and if you further believe from the evidence that said mules were brought into Sheridan county by the defendant, and sold by him in Sheridan county, then the crime charged in the information would be complete in Sheridan county." The above instruction does not properly refer to the commission of

Emmerson v. State.

the offense of larceny as charged in the information. Every element of the crime for which the defendant at the bar is called upon to plead is ignored in its language. The crime of larceny is not even remotely referred to therein. It contains no reference to any belief the jury may have formed from the evidence as to whether there was or was not an unlawful and felonious taking of the property in Cherry county by defendant. The court in effect instructs the jury that, if they believe from the evidence that the mules described in the information ran upon a range or in a pasture in Cherry county, and were taken therefrom and brought into Sheridan county and there sold by the defendant, such conduct of itself constitutes the crime of larceny "in Sheridan county." We believe the language used is susceptible of no other construction, and as used is obviously prejudicial to the rights of the accused, and hence is fatally defective. There were eight instructions given to the jury by the learned trial court, but not one of them, nor do they all collectively, by their terms, supply the omissions or cure the defects herein pointed out. "It is the duty of the trial court to instruct the jury distinctly and precisely upon the law of the case. * * * The instructions should be full, clear, and explicit, giving to the jury all the law so far as it relates to the facts proved or claimed to be proved, if such facts are sustained by any evidence." 12 Cyc. 611.

Among other errors assigned and argued by counsel for defendant is a summary overruling of a plea in bar, entered in apt time by the accused, without an opportunity to have the issue thus by him interposed tried to a jury. But it is unnecessary to discuss this feature for the reason the judgment must be reversed for the error in giving instruction numbered four.

The judgment of the district court is therefore reversed and the cause remanded for further proceedings in accordance with law.

REVERSED.

MARY O. SMITH, APPELLANT, v. WILLIAM H. CARNAHAN
ET AL., APPELLEES.

FILED MARCH 5, 1909. No. 15,475.

1. **Tax Sales: REDEMPTION.** Section 3, art. IX of our constitution, gives to the owner or persons interested in real estate two years to redeem from a sale made for delinquent taxes, and this right of redemption applies to judicial sales for unpaid taxes, as well as to administrative sales.
2. **Taxation: JUDICIAL SALE: REDEMPTION.** Where a county, before any administrative sale of real estate for taxes due thereon, brings an action to foreclose the tax lien and obtains a decree under which the land is sold, the sale so made is a judicial sale, and does not become final and complete until confirmation thereof by the court. In such case the two years given the owner to redeem dates from final confirmation.
3. ———: ———: **CONFIRMATION: REDEMPTION.** Whether on confirmation of a judicial sale for taxes, where no administrative sale has been had, the court has jurisdiction in confirming the sale to cut off the right of the owner to redeem, *quere*. Whether such power and jurisdiction exist or not, an order of confirmation which does not expressly deny to the owner the right of redemption will not be construed as denying that right.
4. ———: ———: **REDEMPTION.** On redeeming from such a judicial sale, the owner should pay the full amount of taxes and costs paid by the purchaser, and 12 per cent. interest thereon.

APPEAL from the district court for Logan county:
HANSON M. GRIMES, JUDGE. *Reversed with directions.*

Hoagland & Hoagland, for appellant.

A. Muldoon, *contra*.

DUFFIE, C.

In August, 1900, the county of Logan commenced an action in the district court to foreclose a lien for taxes assessed against the property in controversy herein. The owner of the legal title and a mortgagee appeared in the action and demurred to the petition, and, their demurrer being overruled, a decree was entered in favor of the

Smith v. Carnahan.

county February 28, 1901. No appeal was taken from this decree, and in October, 1901, the land was sold to Mary O. Smith, the plaintiff herein, for \$250. The defendants in the action filed objections to a confirmation of the sale, which the court overruled. The sale was confirmed and a deed ordered made to the purchaser. The defendants superseded the order of confirmation and appealed to this court, where the case was determined December 7, 1904. *County of Logan v. McKinley-Lanning L. & T. Co.*, 70 Neb. 406. We held that "an absolute order of confirmation of a sale, made in pursuance of a decree for the sale of land for the satisfaction of taxes over objections which deprives the decree debtor of the right of redemption from tax sale given by the statute or the constitution, is erroneous." The order of confirmation was reversed and the case remanded to the district court, with directions "to enter an order confirming the sale, subject to the appellant's right of redemption within the time allowed by law, and to direct the execution and issuance of a deed by the sheriff conveying to the purchaser the premises sold, in the event such redemption is not had within the time provided."

The mandate in the case was filed in the district court February 12, 1905, and on April 30, 1906, on motion of the plaintiff, the court entered an absolute order of confirmation and directed the sheriff to execute a deed to the premises. It is evident from the journal entry made that the district court was of opinion that the two years given by our constitution in which to redeem from a judicial sale made for taxes dated from the date on which the sale was made by the sheriff, and not from the date of confirmation ordered by the court. This clearly appears from the language of the order of confirmation, wherein it is recited: "Now on this date after 1 o'clock and 30 minutes P. M. this case came on to be heard on application of the plaintiff to confirm the sale heretofore made herein. No objections to said confirmation having been made, it is submitted to the court on the mandate of the supreme

court, heretofore issued in this case, and the return of the sheriff to the order of sale, and it appearing to the court that said sale was conducted in all respects as required by law, and that more than two years have elapsed since said sale was made herein, and since the former confirmation of said sale had in this action, and no redemption of said sale has been had by the defendants herein or either of them, and no effort having been made by said defendants to effect said redemption, it is therefore ordered and adjudged that said sale be and the same is in all things confirmed absolutely, and the sheriff is hereby ordered to execute a deed to the purchaser, M. O. Smith, for the following lands."

On the 28th of July, 1906, and within the six months allowed for taking an appeal from said order of confirmation, the plaintiff commenced this action, making the record owner of the land in dispute and numerous lienholders parties defendant, and asking that her title to said land be quieted and confirmed, and that the defendants, each and all, be forever estopped from asserting any right, interest or possession in or to said premises. Howell, the owner of the fee title, filed an answer and cross-bill. In the cross-bill it is alleged that the sheriff's deed issued to the plaintiff in conformity to the order of the court made on confirmation of the sale is absolutely void, because issued within the time allowed him for redemption, and that the order of confirmation was procured by fraudulent misrepresentation of law and facts made to the court, and without notice to the defendants of the pendency of the motion to confirm. It is charged that the plaintiff has collected the rents and profits accruing from said land for the years 1903 to 1906, both inclusive, and he prays that the right of redemption be allowed him, asking for an accounting between the parties, and that title to said land be quieted in him. The facts in the case were either agreed to or established by undisputed evidence and are as above set forth. Upon these facts the court entered a decree allowing the defendant Howell to redeem from the

tax sale upon paying the sum of \$347.75 within 20 days of the entry of said decree. From this decree the plaintiff has appealed.

In the decree entered in this case the court, referring to the confirmation made April 30, 1906, recites: "And the court further finds that he was without power and authority under said order of the (supreme) court and the constitution and the revenue laws of the state to make the absolute confirmation barring right of redemption; that the defendant Howell has made his application herein to redeem from said tax sale within two years from the date of order of second confirmation, offering to pay all the taxes due and costs made in said foreclosure action, and he is entitled to have the prayer of his petition granted and be given leave to redeem." By section 3, art. IX of our constitution, a right of redemption is given from all sales of real estate for the non-payment of taxes for two years after the sale. This applies to judicial sale where there had been no prior administrative sale. *County of Logan v. McKinley-Lanning L. & T. Co.*, 70 Neb. 406. Defendants insist that under this constitutional provision they are given two years from the date of confirmation within which to redeem. It must, we think, be considered that in an action brought, as in this case, to foreclose a tax lien claim by the county, the sale had under the foreclosure decree is a judicial sale, and that it is completed only by confirmation.

In *Hatch v. Shold*, 62 Neb. 764, it was held: "The legal title of mortgaged real property remains in the mortgagor pending the confirmation of a sale thereof made under a decree of foreclosure of the real estate mortgaged." In the opinion it is said: "Until confirmation of sale, the mortgagor's equity of redemption is not cut off, and his legal title to the property gives him a valuable interest therein, and a right of action to protect that interest, subject only to the superior lien of the mortgagee for the amount due on the incumbrance." In *State Bank v. Green*, 8 Neb. 297, the court said: "In sales under a

decree, the court is the vendor and the sheriff or commissioner making the sale a mere instrument, * * * but no title passes by the sale until it is confirmed, and the same rule applies to sales upon execution." On a second hearing (10 Neb. 130) the court again in passing upon the question said: "Under our law governing sales of real property on execution the title of the purchaser depends entirely upon the sale being finally confirmed by the court under whose process it was made, and until this is done the rights of the execution debtor are not certainly divested." While not passing directly upon the question, a late decision of this court strongly favors the views that the sale we are considering is a judicial sale. In *Butler v. Libe*, 81 Neb. 740, affirmed on rehearing, 81 Neb. 744, we held that the purchaser under a decree foreclosing a tax lien was entitled to 12 per cent. interest on redemption from the sale. This holding was based on the view that the statute relating to the interest allowed purchasers at judicial sales governed in this class of cases. We have no hesitation in holding that the sale in question did not become final or complete until confirmation by the court.

It is true, as was substantially held in *Nebraska L. & T. Co. v. Hamer*, 40 Neb. 281, that an accepted bid becomes a binding obligation. This rule is not inconsistent with the conclusions we have reached. There is no completed sale until a report of the proceedings is approved by the court. It is equivalent to a contract which may be enforced against the bidder except under such circumstances as would justify the rescission or reformation of other contracts. On the other hand, it may be set aside for irregularities, and, when such are alleged, it is a matter to be considered and determined by the court. An accepted bid gives to the purchaser the right to demand confirmation and deed, but it is not until confirmation that his attempt to purchase is effective. That such was thought to be the law by this court is apparent from the very fact that more than two years had elapsed after the sale here in controversy, and before this court construed the rights

of the defendants to redeem in *County of Logan v. McKinley-Lanning L. & T. Co., supra*. It necessarily follows that the two years for redemption commences at confirmation, and not at the date of a successful bid.

This brings us to appellant's contention that the right of the defendants to redeem from the tax sale has been adjudicated by the order of confirmation entered in the district court of date April 30, 1907, said order being absolute in its terms and apparently intended to cut off any right of redemption. As we understand the appellant, he concedes that upon the issuance of the mandate by this court in the case above cited the defendants were entitled to have the order of confirmation made conditional, or, in other words, the district court should have entered such a confirmation as would expressly preserve to the defendants their constitutional right to redeem, and it is argued that the order actually entered set at rest that question which is now *res judicata*, the defendants having neglected to appeal therefrom. This leads us to a consideration of the order of confirmation above referred to, for the purpose of ascertaining whether or not it does in fact bar the defendants' right to redeem. It is quite apparent from the judgment appealed from and from the order of confirmation that the trial court by the last order of confirmation attempted to bar the defendants' constitutional right to redeem, but we are convinced that he failed in this purpose, and that his confirmatory order of April 30, 1907, was ineffectual to defeat the defendants' present effort in that regard. By reference to the opinion in *County of Logan v. McKinley-Lanning L. & T. Co., supra*, it appears that the objections were made to the confirmation when the matter was first brought to the attention of the court, in part, because two years for redemption had not expired since the sale. Evidently the defendants then considered that they had only two years from the time the purchaser's bid was accepted in which to redeem, and that this necessarily required that the confirmation be stayed until the expiration of two years. This court held

that the order of confirmation there appealed from, entered by the district court, was erroneous because it did not reserve to the defendants the right to redeem within two years. Such adjudication became the law of the case, and we are not disposed to interfere with the rule there announced, in so far as the disposition of the matters now in issue are concerned. That order of confirmation is not in the record in this case. If it were, it might be that it would not appear effective for the purpose of barring the defendants' right to redeem. However that may be, both the parties and the court assumed that it was sufficient for that purpose, and as such it was held erroneous. The reversal of the first order of confirmation placed the case in the same position it was in before the motion for confirmation and objections thereto were filed.

The plaintiff, when the case was remanded, without notice to defendants, filed a new motion for confirmation upon which the case proceeded without objection or appearance by the defendants; but, the mandate of this court having placed the case in the position in which it existed at the time the first motion for confirmation was filed, we must view the case as though no former motion to confirm had been filed, and no action taken thereon, except, of course, we must give effect to such rules as have become the law of the case. The defendants' right to redeem was never questioned in the pleadings. No issue was ever raised except in the motion for confirmation and objections thereto, which were abandoned by the parties upon the reversal of the judgment rendered thereon. We can see no good reason for the defendants' appearance in the foreclosure case at any stage of the proceedings. They had no defense to the foreclosure which we need to notice here. They had no legal or equitable objection to the confirmation of such sale as the court had jurisdiction to make, nor could they object to the issuance of a deed conveying to the purchaser such title as was foreclosed in the proceeding. Such foreclosure proceeding, as will hereinafter

be more fully pointed out, must necessarily have been made with reference to the defendants' constitutional right to redeem. As was said in *County of Logan v. McKinley-Lanning L. & T. Co.*, 70 Neb. 406: "The right to redeem from sale which is given by the law is usually self-executing and, to enjoy the benefit of which, no proceedings, ordinarily, are required to be had in the courts to make such right effective. A statutory right to redeem fixes the terms upon which such redemption may be had, and the right thus given may be availed of without the formality of a decree, consequent upon an adjudication in court proceedings, and without other or different steps for the establishment of such right than those provided for by the statute itself."

If the order of April 30, 1907, was to be construed as a bar to the right of the defendants to redeem, its validity might well be questioned. In *Bigelow v. Forrest*, 9 Wall. (U. S.) 339, the trial court condemned the land of one Forrest, an officer in the confederate navy, and ordered the same sold under the act of congress of July 17, 1862, commonly called the "Confiscation Act." After the death of Forrest, his son and only heir at law brought an action to recover the land from the purchaser, who contended that, as the title of the elder Forrest was a fee simple title and the libel filed against the land by the government was "against all the right, title, and interest, and estate of the said French Forrest, in and to the said tract of land," the decree of condemnation and the sale thereunder vested in the purchaser the fee title, and not an estate terminating with the life of the elder Forrest, as claimed by the plaintiff. While the decree condemned "the real property mentioned and described in the libel" and directed a sale of the same, the supreme court construed the decree to authorize the sale of a life estate only, that being the only interest which the act empowered the court to sell. In the opinion it is said: "But, under the act of congress, the district court had no power to order a sale which should confer upon the purchaser rights outlasting the life

of French Forrest. Had it done so it would have transcended its jurisdiction."

Under our constitution no sale for taxes, judicial or administrative, can be made which vests in the purchaser an unconditional absolute title. The sale must in all cases be made subject to the owner's right to redeem within two years from the completed sale, and no court or officer has power to sell and convey a higher title. This right was of value. The author knows of no law which will authorize a court to deprive a citizen of valuable property rights in his absence, and without notice to him. But such order cannot be given this force. It is true that the order of confirmation was entered without objection and is absolute upon its face. No objection to the confirmation was necessary to preserve to the defendants the rights given them by the constitution to redeem. It was the completed sale from which the owner had a right to redeem. It is true, he had the right to redeem before, but, as heretofore pointed out, confirmation did not necessarily exhaust such right. The court found that the sale was conducted in all respects as required by law. That being true, the purchaser was entitled to confirmation. The court did not need to inquire further than to ascertain whether or not the proceedings were regular. It mattered not that more than two years had elapsed since the sale and since the confirmation which had been vacated. Nor did it matter that no redemption from the sale had been made by defendants, and no motion had been made to effect said redemption. Defendants were not required to thus exert themselves at that time. The confirmation of the sale was a right existing in the incumbrancer that he might receive the amount due him upon the lien foreclosed, and it was also due to the purchaser that he might receive his deed, and, moreover, have a time definitely fixed during which redemption must be made. We do not consider that the word "absolute" in the order of confirmation in any way interfered with the constitutional right of the defendants to redeem. Most all judicial sales are confirmed abso-

Smith v. Carnahan.

lutely, and yet the purchaser thereof takes only such title as the court had the power to confer. It is apparent from the findings upon which the order of confirmation was based that the court had in mind to bar the defendants from their constitutional right of redemption; but, as we view it, the order entered was not effective for this purpose, and although it did not expressly reserve to the defendants the right which this court adjudged they were entitled to, and which it directed the court to recognize in its order of confirmation, yet the order which was actually entered did not deprive them of this right. The defendants had the right to redeem for two years from and after any confirmation which might have been entered in pursuance to the order of this court, or by any order of confirmation which the lower court made in an attempt to follow the orders and directions of this court, or, for that matter, any confirmation which may have been made unless it expressly denied to the owner his constitutional and statutory right to redeem.

Selby v. Pueppka, 73 Neb. 179, was an appeal from an order of confirmation in a case very similar to this. There, as here, it was urged that to permit a redemption after an order of confirmation had been entered was to allow a collateral attack upon the decree of confirmation. In that case it is said: "The confirmation applied only to the regularity of the proceeding. It held the sale valid and regular, but in no way adjudicated the right of redemption from it. The latter existed by virtue of a self-executing constitutional provision independent of the court. The court's action must be held to have been taken with this right in view. Of course, in this view, that confirmation, like the other proceedings in this sale, was had provisionally and subject to the right of redemption." We take it that the phrase, "that confirmation * * * was had provisionally and subject to the right of redemption," was an implied, and not an express, condition in the order of confirmation, and that it exists by virtue of the constitutional provision, which applies to all sales made of

this character. The above language was quoted with approval by this court in *Wood v. Speck*, 78 Neb. 435, and *Butler v. Libe*, 81 Neb. 740. *Wood v. Speck*, also, was a case wherein the plaintiff was permitted to redeem within two years from the time of the judicial sale which was confirmed by an order of the court on its face unconditionally and without reservation. An adjudication which does not expressly deprive a party of his right of redemption, and which gives to his adversary no title inconsistent with his right to redeem, should not for any technical reason be held to have barred such right.

Plaintiff is rightfully in possession, and continues so until redemption is legally effected, and therefore, is not required to account for rents and profits. The trial court allowed but 7 per cent. interest on the amount bid and paid by plaintiff at the sheriff's sale. Under the rule announced in *Butler v. Libe*, *supra*, it should have been 12 per cent.

We therefore recommend that the judgment of the district court be affirmed so far as it dismisses plaintiff's petition and permits the defendants to redeem, but that it be reversed and remanded, with instructions to the lower court to enter judgment permitting the defendants to redeem only upon the payment of the full amount of the bid, with interest at 12 per cent. per annum.

EPPERSON, GOOD, and CALKINS, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is modified so as to allow redemption on the payment of the full amount bid at the sale, with 12 per cent. interest thereon from date of sale, and the cause is remanded, with directions to the district court to carry this judgment into effect.

JUDGMENT ACCORDINGLY.

NIELS RASMUSSEN, APPELLANT, v. AUGUST BLUST ET AL.,
APPELLEES.*

FILED MARCH 5, 1909. No. 15,514.

1. **WATERS: IRRIGATION CANAL: RIGHT OF WAY.** One who has not acquired a right of way for an irrigation canal over the public lands of the United States prior to their entry as a homestead must arrange for such right of way with the entryman or take proper proceedings to appropriate the land for that purpose.
2. ———: ———: ———: **RIGHT OF ENTRYMAN.** The construction of an irrigation canal through the public lands of the United States without first securing the consent of the general government or taking a right of way deed from a homestead entryman, who afterwards abandons the land and allows it to revert to the general government, gives the proprietor of the canal no claim to the land over which it runs as against a subsequent entryman.

APPEAL from the district court for Dawes county:
WILLIAM H. WESTOVER, JUDGE. *Affirmed.*

J. E. Porter, for appellant.

Allen G. Fisher, *contra*.

DUFFIE, C.

The plaintiff has projected and partially completed a system of irrigation in Dawes county, Nebraska. The proposed system is something over 30 miles in length, of which about 15 miles have been completed, and which include certain reservoirs for the storage of waste water. In April, 1901, he made an application to the commissioner of the general land office at Washington for right of way for his system over the public lands of the United States, under the act of congress approved March 3, 1891, and subsequent acts amendatory thereof. A certified copy of a letter from the commissioner of the general land office of date November 16, 1906, is to the effect that plaintiff's application was returned for correction, the date when said application was last returned being June

* Rehearing allowed. See opinion, 85 Neb. —.

13, 1902, and that, no correction being made by Rasmussen, no action had been taken thereon by the officers of the general land office, it being considered that the application had been abandoned. Under these circumstances any claim to a right of way granted by the general government, or any supposed right growing out of a pending application therefor, can receive no consideration in disposing of this case.

Some of the lands through which the plaintiff's ditch is constructed were at the time occupied by parties under homestead entries. From some of these, right of way deeds were obtained, and, as we understand the record, some of the lands now occupied by the defendants were formerly in possession of homestead claimants who granted to the plaintiff right of way through their lands, but these homestead claimants have since abandoned their entries, and the land reverted to the United States free from any claim by such parties. The defendants are now in possession of some of these lands and refuse to allow the plaintiff to enter thereon for the purpose of clearing out his ditch, repairing or operating the same. This action was brought to enjoin them from interfering with his control, operation, repairing and maintaining the ditch through these lands. The answer of the defendants is quite lengthy, and to the effect that the waters of the creek from which the plaintiff supplies his ditch are wholly insufficient to supply an irrigation canal, and that it is entirely dry during portions of the year, so that the project is not a feasible one.

The plaintiff is constructing his ditch under a permit obtained from the state board of irrigation, which has jurisdiction in the first instance to grant such permits, and to determine from what streams water may be taken and the amount of such water. The action of that board cannot be questioned or ignored in this proceeding. It is evident from the evidence that the plaintiff has no right of way granted him by the defendants over their lands, and the fact that before they entered the same from the

United States they had knowledge that the ditch was projected, or even built through the lands now occupied by them, cannot operate as an estoppel against their assertion of title or their objecting to the plaintiff trespassing upon their lands. His application to the federal government for a right of way has apparently been abandoned, and the defendants, when they entered the land from the United States, took it free from any claim which the plaintiff might have had were his application still pending. Whether a pending application for a right of way through the public lands would take precedence over a homestead entry made subsequent to such application is not a question upon which we are called to express an opinion. The plaintiff, before he can enter upon the lands of the defendants, in maintaining and operating his ditch, must either obtain a right so to do by agreement with the occupants or by condemnation proceedings instituted for that purpose. We cannot discover from the record that such a right now exists, and the district court properly dismissed his petition.

We recommend an affirmance of the judgment.

EPPELSON, GOOD and CALKINS, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

GEORGE B. MORAN, APPELLANT, v. CHICAGO, BURLINGTON &
QUINCY RAILROAD COMPANY, APPELLEE.

FILED MARCH 5, 1909. No. 15, 533.

1. **Public Lands: RAILROADS: HOMESTEAD: PRIORITIES.** September 24, 1886, the secretary of the interior approved the line of survey made by the Grand Island & Wyoming Central Railroad Company for the building of its road in Grant county, Nebraska, and a map of the approved survey was, by direction of the secretary,

sent by the commissioner of the general land office to the district land office and there filed November 13, 1886. *Held*, That under the act of congress of March 3, 1875, any party entering public lands, over which said survey extended, as a homestead or otherwise, after such approved map was filed in the district land office, took the land subject to a right of way for the building of the road, such right of way extending 100 feet from the center of its track on each side thereof.

2. ———: RAILROADS: RIGHT OF WAY. The fact that the profile of its surveyed line was sent directly to the secretary of the interior by the president of the railroad company, instead of being transmitted to him through the district land office, is immaterial.
3. RAILROADS: EASEMENT: ADVERSE POSSESSION. "The use for agricultural purposes, such as grazing and cultivation by adjoining land-owners of otherwise unused and unfenced parts of the right of way of a railroad company, is not inconsistent with or adverse to the enjoyment of the easement." *Roberts v. Sioux City & P. R. Co.*, 73 Neb. 8.

APPEAL from the district court for Grant county:
JAMES N. PAUL, JUDGE. *Affirmed*.

Sullivan & Squires, for appellant.

J. E. Kelby, Frank E. Bishop and Arthur R. Wells,
contra.

DUFFIE, C.

The facts stipulated by the parties disclose that one Fitzpatrick on the 18th of December, 1886, made homestead entry of the northwest quarter of the southeast quarter, and the northeast quarter of the southwest quarter, and lots 3 and 4, section 19, township 24, range 36, in Grant county, Nebraska. He departed this life while living upon the land, and his heirs in due time made final proof in support of his entry, residence and cultivation, and a patent was issued to them embracing the whole of the above described lands without reservation or condition. The heirs afterwards conveyed the land to the plaintiff herein, who is now in possession.

In April, 1886, the Grand Island & Wyoming Central Railroad Company surveyed a line for a proposed road

Moran v. Chicago, B. & Q. R. Co.

over the land hereinbefore described, and after said survey the said company transmitted by mail to the secretary of the interior at Washington a map of the survey of the proposed line. On September 24, 1886, the secretary of the interior approved the line of survey, and on October 12, 1886, the commissioner of the general land office, by direction of the secretary, advised the president of the company that the secretary had approved the line of survey, and that copies of the maps had been sent to the register and receiver of the local land office with necessary instructions. These maps were received at the local office November 13, 1886, and the register, in acknowledging receipt of the maps, informed the commissioner of the general land office "that said line of route has been duly marked upon the records of this office in consonance with instructions contained in circular dated January 7, 1880." The action of the railroad company in sending a map of the location of its survey and route was for the purpose of acquiring a right of way over the public lands under the act of congress of March 3, 1875 (18 U. S. Statutes at Large, p. 482. ch. 152). The first section of this act granted to any railroad company, duly organized under the laws of any state or territory, except the District of Columbia, or by the congress of the United States, the right of way over the public lands to the extent of 100 feet on each side of the central line of said road. The fourth section of the act defines the steps to be taken to obtain its benefits, and is as follows: "That any railroad company desiring to secure the benefits of this act shall, within twelve months after the location of any section of twenty miles of its road, if the same be upon surveyed lands, and, if upon unsurveyed lands, within twelve months after the survey thereof by the United States, file with the register of the land office for the district where such land is located a profile of its road; and upon approval thereof by the secretary of the interior the same shall be noted upon the plats in said office; and thereafter all such lands over which such right of way shall pass shall be disposed of

subject to such right of way: *Provided*, That if any section of said road shall not be completed within five years after the location of said section, the rights herein granted shall be forfeited as to any such uncompleted section of said road." During the year 1887 the Grand Island & Wyoming Central Railroad Company constructed its road over the land in question, and thereafter built fences on each side of its track and distant 25 feet from the central line thereof, thus including a strip 50 feet wide. The remainder of the 200 feet right of way, being 75 feet on each side of the track, was used by the plaintiff and his grantors in connection with the adjoining land from the time the railroad fence was built up to a short time before this suit was begun, when the defendant company was about to take possession of all of its right of way, whereupon the plaintiff commenced this suit and applied for an injunction to restrain the defendant from taking any part of the 200 feet strip claimed as its right of way and lying outside its fences. On the final hearing the temporary injunction issued on the plaintiff's application was dissolved and his petition dismissed. From this judgment he has appealed.

By reference to the fourth section of the act of March 3, 1875, it would seem that the regular course of proceeding by a railroad company seeking to obtain a right of way over the public lands of the United States was to file a profile of its line in the land office of the district where its line was located, and this profile would be transmitted by the register and receiver to the secretary of the interior for his approval. If the secretary of the interior approved the line of survey, the map would be returned to the district land office, and when there filed all public lands thereafter disposed of, crossed by the survey, would be taken subject to the right of way granted to the railroad company. If we understand the contention of the appellee, it is to the effect that the Grand Island & Wyoming Central Railroad Company did not comply with the act of congress, in that it sent the map of its survey directly to

the secretary of the interior, instead of having it transmitted to him by the officers of the district land office. This we regard as wholly immaterial. Before the railroad company could acquire a right of way over the public lands, a map of its survey had to be approved by the secretary of the interior, and, before parties entering public lands could be in anywise affected by any claimed right of way, the approved map had to be returned and filed in the local land office. When this was done, parties entering public lands over which the approved survey was made took these lands burdened with the right of way granted by the general government, and, while they had to pay for the whole tract, the right of way was legally vested in the railroad company. That subsequent entrymen took the land subject to the rights of the railroad company is apparent from the provisions of section 4 of the act, and has been expressly ruled in *Jamestown & N. R. Co. v. Jones*, 177 U. S. 125; *Northern P. R. Co. v. Townsend*, 190 U. S. 267; *Minneapolis, St. P. & S. S. M. R. Co. v. Doughty*, 208 U. S. 251.

In a circular issued by the department of the interior and found in 12 Land Dec. 428, the following rule was announced: "All persons settling on public lands to which a railroad right of way has attached take the same subject to such right of way and must pay for the full area of the subdivision entered, there being no authority to make deductions in such cases." The interior department has also held that it was improper to include in the patent issued any exceptions making the grant subject to a railway right of way acquired under the act of 1875. *Dunlap v. Shingle Springs & P. R. Co.*, 23 Land Dec. 67; *Oregon S. L. R. Co. v. Harkness*, 27 Land Dec. 430; *Denver & R. G. R. Co. v. Clack*, 29 Land Dec. 478. The fact that the patent issued by the general government for the tract of land conveyed to the plaintiff's grantors did not contain an exception of the right of way obtained by the defendant is therefore wholly immaterial and can have no bearing upon the rights of the parties.

Relating to the plaintiff's claim of title acquired by adverse possession, the stipulation is clear that his use of the land outside of the line of the fence constructed by the defendant company was for the hay growing upon said land and for pasture purposes after the hay had been cut and removed. In *Roberts v. Sioux City & P. R. Co.*, 73 Neb. 8, it was held: "The use for agricultural purposes, such as grazing and cultivation by adjoining landowners of otherwise unused and unfenced parts of the right of way of a railroad company, is not inconsistent with or adverse to the enjoyment of the easement." In other words, it was held that the use of a part of a railroad right of way by an adjoining owner for agricultural purposes would not ripen into a title, however long that possession and use was continued. This we believe to be the general rule adopted by a great majority of the courts, and which appears to us to be founded in reason from the fact that such possession does not interfere with the business of the road or the maintenance of its line, and, until the land may be needed by the company in the further progress of its business, the possession and use will be regarded as permissive.

We discover no error in the record, and recommend an affirmance of the judgment appealed from.

EPPELSON, GOOD and CALKINS, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

HIMENUS ADAMS, APPELLEE, v. CHARLES M. FISHER,
APPELLANT.

FILED MARCH 5, 1909. No. 15,474.

1. **Contracts: ACTIONS: INSTRUCTIONS.** In an action to recover a balance due upon a verbal contract to exchange work, which is denied, the evidence being in conflict, the court should instruct the jury, in substance, that to entitle the plaintiff to recover therefor he must show that the value of work done by him for defendant exceeded the value of work done by defendant for plaintiff.
2. **Trial: PREJUDICIAL ERROR.** In the trial of a case in the district court on appeal, it is error for counsel or the court to inform the jury of the result of the trial in the lower court, and also error for the court to reprimand opposing counsel for objecting to such conduct.

APPEAL from the district court for Logan county:
HANSON M. GRIMES, JUDGE. *Reversed.*

Hoagland & Hoagland, for appellant.

Wilcox & Halligan, contra.

EPPERSON, C.

Plaintiff brought this action in the county court to recover upon three items—two for pasturing defendant's cattle, and one for a balance due upon a verbal contract to exchange work in putting up hay for the defendant. Plaintiff recovered in the county court and on appeal in the district court. In the petition he alleges specifically with reference to the hay transaction that the amount claimed is due under a verbal agreement to exchange work. The evidence given in support of this allegation is that plaintiff and his employees, in pursuance to said verbal contract, assisted in cutting and stacking 102 tons of hay more for defendant than was cut and stacked for plaintiff, and that generally it was worth \$1 a ton to put up hay. Plaintiff contends that, as he furnished one-half the labor,

he should recover one-half the value of putting up the 102 tons. This would be true, of course, if the labor expended upon each ton of hay was of the same value. But plaintiff introduced no evidence whatever as to the difference in value of the labor performed by his employees and those of the defendant. The defendant's evidence was, in effect, that he furnished a few days' labor less than the plaintiff, but that he furnished more horses needed, and that, upon the whole, he furnished more of value than did the plaintiff. And, again, defendant's evidence shows that a greater amount of labor was required to put up the plaintiff's hay and more time expended therein because they were required to sweep his hay further and go a greater distance to their meals, whereby it would appear that the amount of hay put up for each party did not indicate the amount of labor expended. After the testimony was concluded, and after the trial judge had read six of the ten instructions given by him, the defendant requested the court to give an instruction as follows: "The jury are instructed that, if you find from the evidence that the value of the labor and materials furnished by the defendant Fisher to the plaintiff Adams in their haying operations involved in this action equaled or exceeded the value of the labor and materials furnished by the plaintiff Adams to the defendant in the said haying operations, then the plaintiff cannot recover in this action anything on account of his claim for said haying contract." The court refused this instruction because it was not offered until after six instructions had been read, and, further, because it pertains to an issue not raised by the pleadings. Under the pleadings (and we have reference now more particularly to the plaintiff's petition) the instruction should have been given. He was not entitled to recover upon this item in the event that the labor and material furnished by the defendant were equal to or in excess of that furnished by the plaintiff to the defendant under the terms of the verbal contract sued upon. This defect was not cured by any instruction given by the court. It is true that the defendant alleged

there had been a settlement made under this verbal contract before the parties had finished putting up hay, but this did not obviate the necessity of plaintiff proving his case. It may be well to observe, however, that defendant's general denial, in view of the evidence, was sufficient to require the instruction. The request did not come too late, as a statement of the law controlling plaintiff's right to recover should have been given in the absence of a request.

In the argument to the jury the plaintiff's then counsel stated, in substance, that this case was tried in the lower court and judgment rendered there in favor of the plaintiff, and that the defendant was responsible for the case being in the district court. Defendant's counsel excepted to the above remarks, and the court then stated: "The record in this case shows that this case was tried in the lower court, and a judgment was rendered in the lower court in favor of the plaintiff and against the defendant, and that the defendant had appealed the case to this court." Counsel then excepted to the statement of the court, whereupon the court replied: "There was not a man on the jury that did not know what the judgment of the lower court was, and there is no use in your trying to keep it from them." The court, however, did instruct the jury not to consider the objectionable remarks of plaintiff's counsel. It was clearly error for the counsel to have informed the jury as to the result of the trial in the lower court, and for the court to emphasize the fact, and, in addition thereto, reprimand opposing counsel for objecting. Nor can we see that the court's instruction to the jury to disregard the statements made cured the error. In such an event the court should give positive instructions to the jury not only to disregard the improper statements of counsel, but also to totally disregard the result of the trial in the lower court in arriving at their verdict. Many other errors are assigned. We have examined all of them, and do not find it necessary to make special reference thereto.

Johannes v. Thayer County.

We recommend that the judgment of the district court be reversed and this cause remanded for further proceedings.

DUFFIE, GOOD and CALKINS, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the lower court is reversed and this cause remanded for further proceedings.

REVERSED.

H. C. JOHANNES ET AL., APPELLANTS, v. THAYER COUNTY,
APPELLEE.

FILED MARCH 5, 1909. No. 15,509.

Constitutional Law. Section 5514, Ann. St. 1907, in so far as it assumes to authorize an appeal from the decision of the county board upon the questions of public utility, is void.

APPEAL from the district court for Thayer county:
LESLIE G. HURD, JUDGE. *Affirmed.*

M. H. Weiss and *J. T. McCuiston*, for appellants.

John P. Baldwin and *T. C. Marshall*, contra.

EPPERSON, C.

The appellants filed a petition with the county board of Thayer county, asking for the construction of a drain with a view of draining certain farm lands and public roads in that county. The petition was filed under the provisions of section 5500 *et seq.*, Ann. St. 1907. Upon receipt of said petition, the county commissioners viewed the premises and found that the said improvement ditch or drain was not necessary, and would not be conducive to the public health, convenience or welfare, and dismissed the appellants' petition. An appeal was taken to

the district court, where a trial was had, and the action of the county board sustained.

We have not examined the evidence. The only argument made by the appellants is that the proposed improvement would be conducive to the public health, convenience and welfare, and that the drain is necessary for the reclamation of the appellants' land. In *Tyson v. Washington County*, 78 Neb. 211, with which we are content, it was held in effect that the question of drainage is a matter of governmental policy, and that the power to exercise control over administrative bodies cannot be conferred upon the courts by the legislature, and that section 5514, Ann. St. 1907, in so far as it is assumed to authorize an appeal from the decision of the county board upon the question of public utility, is inoperative.

We therefore recommend that the judgment of the district court be affirmed.

DUFFIE, GOOD and CALKINS, CC., concur.

By the Court: For the reasons given in the foregoing opinion, the judgment of the district court is

AFFIRMED.

STATE, EX REL. BERNARD KREBS, APPELLANT, v. THOMAS HOOTOR ET AL., APPELLEES.

FILED MARCH 5, 1909. No. 15,529.

1. **Intoxicating Liquors: LICENSE: REVOCATION.** Power given to a board of fire and police commissioners by statute to license, restrain, regulate, or prohibit the sale of intoxicating liquors by ordinance is sufficient to authorize the board to adopt rules controlling the traffic, including the right to revoke a license upon the violation by the licensee of any statute, or city ordinance, or any reasonable rule adopted by the board for the control of the traffic.
2. ———: **BOARD OF FIRE AND POLICE COMMISSIONERS: ORDINANCES.** The manner for the adoption of ordinances by the city council of South Omaha, as prescribed by section 8308, Ann. St. 1907, does

State v. Hoctor.

not apply to ordinances adopted by the board of fire and police commissioners of that city.

3. ———: ———: ———. In the absence of a statute prescribing a manner for the adoption of ordinances, any reasonable mode which the board adopting them may follow is sufficient.
4. ———: VIOLATION OF ORDINANCES: COMPLAINT. A rule of the board of fire and police commissioners providing that any officer of the city may make complaint of the violation of law by a licensee does not prevent others from making such complaint, although not expressly given the right to do so.

APPEAL from the district court for Douglas county:
HOWARD KENNEDY, JUDGE. *Affirmed.*

McGilton & Gaines, for appellant.

S. L. Winters, A. H. Murdock and W. C. Lambert,
contra.

EPPERSON, C.

Relator seeks a peremptory writ of mandamus requiring the respondents, who are the members of the South Omaha board of fire and police commissioners, to restore to him a liquor license which that board had issued and later revoked for alleged violations of the statute, the city ordinances, and the rules of the board. The lower court dismissed the complaint, and relator appealed. A complaint had been filed with the board accusing relator of selling liquor on Sunday. A hearing was had, upon notice to relator, who appeared and introduced evidence in his own behalf. The board found him guilty of the charges and revoked his license.

He now claims that the board had no power to hear and determine matters of evidence relating to an alleged violation of the liquor law. The city charter provides that said board "may, by ordinance, license, restrain, regulate, or prohibit the selling or giving away of malt, spirituous, vinous, mixed or fermented intoxicating liquors. * * * Provided, that any license issued by the board of fire and police commissioners * * * shall

State v. Hoctor.

be revoked by the board * * * upon conviction of the licensee of any violation of any law, ordinance, or regulation pertaining to the sale of such liquors, and proceedings of appeal or error taken to review such judgment of conviction shall in nowise affect the revocation of such license." Section 8414, Ann. St. 1907. Under the above proviso the respondents are required to revoke a license upon the conviction of the licensee of the violation of the liquor laws of the state or the ordinances of the city. And such power is complete, although no ordinance for that purpose had been adopted by the fire and police commissioners. But it was not the purpose of the legislature to restrict the power of said board to revoke licenses to cases where the licensee had been convicted in a criminal court. The power given in the first part of the section above quoted to restrain, regulate, or prohibit the sale of intoxicating liquors by ordinance is sufficient to authorize the board to adopt by-laws or rules controlling the traffic, including the right to revoke a license upon the violation of any statute or ordinance of the city pertaining to the traffic, or for a violation of any reasonable rule adopted by the board for the control of the traffic. *Milcs v. State*, 53 Neb. 305; *Langan v. Village of Wood River*, 77 Neb. 444. These cases related to the powers given to a city council and board of trustees identical with the power conferred upon the respondents.

But it is argued that the ordinances or by-laws adopted by respondents were irregularly and defectively adopted, in that an aye and nay vote is not shown by the record to have been taken, nor does the record show who were present, nor had the resolution been previously read or offered, nor was it ever published. The record does show that a motion was made to adopt the rules alleged to have been violated, and that the motion carried. The statute does not provide the manner of adopting ordinances by the respondents. Such are not city ordinances within the meaning of section 8308, Ann. St. 1907, prescribing the manner of passing ordinances of the city by the city

council. There being no statute prescribing the manner for the adoption of ordinances, any reasonable mode which the respondents might adopt would be sufficient, and the so-called rules which the relator is alleged to have violated are ordinances within the meaning of the statute. The words "ordinances," "rules," "regulations," and "by-laws" are synonymous terms. 6 Words and Phrases, 5025; *Stute v. Dudgeon*, ante, p. 371. By such rules the respondents herein provided for the revocation of a license after notice to the licensee, and upon satisfactory evidence of his violation thereof. Their decision cannot be attacked by mandamus. And, again, the rules which relator assails are the rules under which his license was granted. If they are defective, he was not entitled to his license and therefore has nothing which may be restored to him. Neither can he complain that he had no notice of such rules. His license expressly provided that it may be revoked for any violation of the rules of the board, or ordinances of the city, or the provisions of the statute with respect to the sale of intoxicating liquors.

Further complaint is made that one of the rules is contrary to public policy and void, because it provides that any member of the police department or city official may file complaint accusing a licensee of a violation of the rules, and does not expressly provide that a complaint may be made by any other person. It is argued that under this rule no one but a city official or a member of the police department may file a complaint against a licensee. There can be no doubt but that a provision that no one but an officer could complain of a violation of the law by a licensee would be ineffectual. In the absence of a rule, it would seem to be the duty of the board to investigate any complaint lodged with them, if made by a responsible person in a position to know the facts. The rules adopted should not be construed as exclusively providing that no one but officers or members of the police department could complain. In any event the complaint upon which the

Lewis v. McDonald.

relator was tried was filed by one who was permitted to file the same.

We recommend that the judgment of the lower court be affirmed.

DUFFIE, GOOD and CALKINS, CC., concur.

By the Court: For the reasons given in the foregoing opinion, the judgment of the district court is

AFFIRMED.

GEORGE P. LEWIS, APPELLANT, v. N. P. McDONALD ET AL.,
APPELLEES.

FILED MARCH 5, 1909. No. 15,539.

1. **Evidence: INTENT.** When the intentions of an interested witness become a matter for judicial inquiry, they are ascertained by a consideration of his conduct, and not by his declarations or testimony as to what his intentions were.
2. **Brokers: COMMISSION: EVIDENCE.** As between two brokers, through each of whom negotiations for the sale of land were made with a prospective purchaser, he who can show that his agency was the effective cause of the sale is entitled to recover the broker's commission.
3. ———: ———: ———. Plaintiff, a real estate broker having authority to sell defendant's land, visited the land with the purchaser, and thereafter continued negotiations which were never expressly terminated. Without any intervening agency, purchaser decided to buy, but made an arrangement with the interpleader, also a real estate agent, whereby the latter, with full knowledge of plaintiff's negotiations, solicited and received authority to sell the land, and a promise from the owner of a commission in case he effected a sale, attempting at the same time to procure the land for less money than purchaser was willing to pay. The interpleader promised to divide the commission with the purchaser. The defendant, not knowing of plaintiff's negotiations with the purchaser, agreed that interpleader should bind him by a written contract to convey. *Held*, That as between the brokers plaintiff's efforts were the effective cause of the sale, and he is entitled to the commission.

APPEAL from the district court for Buffalo county:
BRUNO O. HOSTETLER, JUDGE. *Reversed.*

C. A. Robinson and Albert & Wagner, for appellant.

W. D. Oldham and H. M. Sinclair, contra.

EPPERSON, C.

Plaintiff, a real estate broker of Lexington, sued to recover a commission due upon a sale of defendant's real estate which plaintiff alleges was brought about through his agency. Defendant brought the sum sued for into court, and upon his motion one J. L. Mitchell, another broker of Lexington, was required to interplead, claiming that the sale was effected by him as defendant's agent and that the commission was due to him. The interpleader prevailed, and plaintiff appealed.

Prior to February 28, 1907, the defendant had listed the land in controversy with the plaintiff for sale. He had also listed it with the other brokers, but not with the interpleader. On that day the plaintiff offered the land to one Clifford who afterwards purchased. Clifford was desirous of buying land in that vicinity, and had spent some time in viewing farms which were for sale. He had visited several farms which the interpleader had the agency for, and thereby not being able to find desirable land visited the plaintiff for the purpose of ascertaining what he had. Plaintiff took him to the defendant's farm, a distance of about nine miles, and showed him the land, and with which the purchaser was favorably impressed, but did not at that time conclude to purchase. The conversations had between the plaintiff and the purchaser are of considerable value in ascertaining to what extent the plaintiff's efforts were effective in bringing about the sale. The plaintiff testifies that on their way home he had a conversation with the purchaser, in which the purchaser spoke favorably of the land, and asked plaintiff

Lewis v. McDonald.

if he would throw off any of his commission. Plaintiff told him that there was not much in it, but that he would pay the car fare to and from the purchaser's home. Whereupon the purchaser said: "I will tell you what I will do. If my title on the other piece of land is all right I will take this piece, and if it is not I may take it anyway, and if I see a half-section somewhere altogether I may take that." A few days later the purchaser said to the plaintiff: "Lewis, you are ahead yet," and still later that he would be back in about a week and see what he would do. These conversations are not expressly contradicted by the purchaser. He testified to the conversation between himself and the plaintiff as follows: "Before I left that afternoon I says: 'If I should conclude to take anything you have shown, or that you may show me, would you make any sort of a deal in regard to the commission?' He says: 'No, I don't do that kind of business. The best I would do would be to pay your car fare. Is not that good enough?' I says: 'That is fair, but there are some that would do better.'" A few days after his visit to the defendant's land with the plaintiff, the purchaser returned to his home at York, and on the 12th of March following again went to Lexington and renewed his search for desirable land, at this time doing business only with the interpleader. He was not satisfied with any land exhibited to him at that time, and on the morning of March 13 he told the interpleader that the defendant's land was as good a bargain as he could find; that if he (the interpleader) could get it according to the terms that they had agreed to he would buy it. By this he had reference to an agreement between them whereby interpleader gave to purchaser one-half of his commission on land sold to the purchaser. It must be remembered that the interpleader at that time had not been employed by the defendant nor authorized by him to make a sale of his land. He had done nothing toward effecting a sale. He had previously been endeavoring to sell other land to the purchaser instead. He knew of the negotiations between plaintiff and the purchaser

which had never terminated. Through an arrangement made early on the morning of March 13 between the purchaser and the interpleader, and after the purchaser had made up his mind to buy defendant's land, interpleader telephoned defendant, who resided in another county, informing him that he had a friend who might purchase the land, and wanted authority to sell the same and to bind the defendant by a written contract. He also asked for and received a promise of a commission in case he made a sale. In this conversation interpleader attempted to get the land for less money than was demanded by the owner. The owner did not know that the plaintiff herein had been negotiating with the purchaser when he entered into the agreement with the interpleader.

The question here involved is simply to determine which of the two brokers is entitled to the commission. The defendant acted in utmost good faith. He is willing to pay one commission, which he could possibly avoid by pleading the statute of frauds. This he has waived. Had it not been for the intervention by the interpleader during the negotiations for this sale by plaintiff, no doubt would exist but that the controversy between the plaintiff and defendant could have been quickly adjusted. In *Butler v. Kennard*, 23 Neb. 357, it is held: "Where the price of property and terms of payment are fixed by the seller, and a broker engages to procure a purchaser at this price and upon these terms, if, upon the procurement of the broker, a purchaser is produced with whom the seller himself negotiates and effects a sale, the broker is entitled to his commission." In the opinion we find the following: "It is a well-established rule in this as well as other states that, where a broker is employed to sell real estate, it is not necessary that the whole contract should be completed alone by him, in order to entitle him to his commission. But if, through his instrumentality, the purchaser and owner are brought in contact, and a sale is made through the instrumentality of the agent, he is entitled to his compensation; and this without reference to whether the

owner, at the time the sale was perfected, had knowledge of the fact that he was making the sale, through such instrumentality." See, also, the following cases: *Potvin v. Curran & Chase*, 13 Neb. 302; *Nicholas v. Jones*, 23 Neb. 813; *Craig v. Wead*, 58 Neb. 782. Under this rule and the facts in this case, we think that the plaintiff is entitled to recover, unless the agency and the efforts of the interpleader were such as to give him a greater right to the commission. As between two brokers, he is entitled to recover who can show that his efforts resulted in the sale of the land. If the sale is the result of efforts exercised by both the brokers, the rule seems to be that the one who first brought the seller and purchaser together is entitled to the commission. By bringing the seller and purchaser together we do not mean necessarily that he must introduce them to each other, but that, if his efforts result in bringing the minds of the two to an agreement resulting in the sale and purchase of the land, then, within the meaning of the law, he has brought them together. In the case at bar there can be no doubt but that it was through the agency of the plaintiff that the sale in controversy was negotiated. The interpleader had no part in negotiating the sale. He put forth no efforts whatever to bring about the transfer. He exerted himself only after the purchaser decided to buy. The motive which then prompted him to action seemed to be to secure as good a bargain as possible for his friend, the purchaser, and for himself a commission he never earned.

The purchaser saw the land only when it was shown him by the plaintiff. The only negotiating for the land was with the plaintiff. The plaintiff was the only human agency exercised in behalf of the defendant which was influential in the transaction. It is true the purchaser testified that he would not have purchased through the plaintiff. In this he was mistaken. He further testified that he made up his mind to purchase on the morning of March 13 at the breakfast table, which was before the interpleader telephoned to defendant. His conduct was incon-

Lewis v. McDonald.

sistent with his intention expressed on the witness stand that he did not intend to buy otherwise than through the interpleader. He is interested in this action, and expects to receive one-half the commission recovered by the interpleader. We ascertained his intentions from his conduct, and not from his statements as to what they were. The lower court found that the interpleader was entitled to the commission for his services in making the sale. On what theory the trial court reached this finding we cannot discern. We cannot see anything in this case indicating that the interpleader did anything whatever to earn a commission. Nor can we see wherein his efforts resulted in the consummation of a sale or in any way influenced the purchaser to buy. Were the defendant contesting the demands of the interpleader, without doubt he would prevail, because interpleader, while pretending that he desired to represent the defendant, in fact was representing purchaser and attempting to get the land for less than the defendant was demanding therefor.

Holland v. Vinson, 124 Mo. App. 417, 101 S. W. 1131, is very similar to the case at bar, with a few distinguishing features making the case even stronger for the party standing in a position similar to that occupied by Mitchell in this case. There a real estate broker, who was suing for his commission, was unable to consummate the sale upon the terms authorized, but while the purchaser was still negotiating with him the owner authorized another agent to sell to the purchaser for a less amount. In the opinion the court said: "If such a course of business was tolerated a real estate broker never would feel sure of his commission. But it is not tolerated. The law will not permit one broker who has been intrusted with the sale of land and is working with a customer whom he has found, to be deprived of his commission by another agent stepping in and selling to said customer for less than the first broker is empowered to receive. The landowner does wrong to grant such authority to the interfering broker and is bound to pay the one who procures the buyer. * *

Lewis v. McDonald.

The conclusion is almost irresistible that the sale was concluded in the manner it was in order to beat plaintiffs out of their compensation. Whether that was true or not, the sale was made to their customer, and one whom they had procured by their own efforts, before he had refused to buy from them and while they were endeavoring to sell to him. The whole matter happened in a week."

Another Missouri case similar to this is *McCormack v. Henderson*, 100 Mo. App. 647, 75 S. W. 171. Plaintiff had solicited a sale of the property to the purchaser and visited him several times. Plaintiff left town on Monday and returned Friday. During his absence one McGregor, who was the purchaser's friend, was told about the property by the purchaser. McGregor then, at the purchaser's request, and as his representative, went to the defendant after the purchaser had decided that he wanted the house, and through him submitted to the defendant the highest price the purchaser would pay. The negotiations finally resulted in defendant fixing the price at less than that for which plaintiff was authorized to sell. Previously, however, the purchaser had decided not to buy through the agency of the plaintiff because he had taken offense at some language used by the plaintiff. The court held that the evidence was sufficient to show that the efforts of the plaintiff were the procuring cause of the sale, notwithstanding defendant consummated it himself with McGregor, who was, in fact, the agent of the purchaser. The court said: "If it was through plaintiff's efforts, of which there can be no doubt, that McClintock came to the conclusion to purchase the fact that because he became dissatisfied with plaintiff and made the arrangement to purchase through McGregor did not have the effect of depriving plaintiff of his right to commission for his services. The evidence that McClintock had concluded to buy the property before he ceased negotiations with plaintiff was clear."

In *Reynolds v. Tompkins*, 23 W. Va. 229, the court held that where one broker finds a purchaser whom he negoti-

ates with for the sale of land, and when the sale is about to be consummated another broker meets the prospective buyer, and with full knowledge of the negotiations of the first broker sells the property to such buyer for a less price, and the owner ratifies such sale in ignorance of the negotiations of the first broker, the owner is not liable to the second, but to the first broker for commission. There are many cases holding that the first broker attempting to sell to the purchaser in a contest between brokers is not entitled to recover, but we are unable to find any case holding that a broker whose efforts have not resulted in the sale, and who steps in when the sale was substantially consummated, is entitled to prevail as against a former broker who has been successful in bringing the purchaser to the owner or whose efforts alone were effective in bringing about the sale.

We recommend that the judgment of the district court be reversed and this cause remanded for further proceedings.

DUFFIE AND GOOD, CC., concur.

By the Court: For the reasons given in the foregoing opinion, the judgment of the district court is reversed and this cause remanded for further proceedings.

REVERSED.

GUSTAVE TESKE, GUARDIAN, APPELLANT, v. MARTHA DITTBERNER ET AL., APPELLEES.

FILED MARCH 5, 1909. No. 15,386.

1. **Homestead: SELECTION: VOID CONTRACT.** Frederick Teske and wife for a valuable consideration orally agreed with Carl Teske that he should at their death have certain lands, in a part of which they had at the time a homestead estate. In an action by Carl against Frederick it was decreed that the agreement was void as to the homestead estate and valid as to the remainder of the land. *Held*, That the homestead estate should be appraised and ascertained as of the date of the oral agreement.

Teske v. Dittberner.

2. **Contracts: CONSTRUCTION.** The meaning of a sentence or part of a written instrument should be ascertained by considering all of the parts and provisions of the instrument together, and not by taking a single sentence or part standing alone.

APPEAL from the district court for Madison county:
ANSON A. WELCH, JUDGE. *Affirmed.*

M. D. Tyler and McKillip & McAllister, for appellant.

William V. Allen and Willis E. Reed, contra.

GOOD, C.

On January 4, 1893, Frederick Teske and wife for a valuable consideration orally agreed with their son Carl Teske that at their death he should have certain lands. At that time Frederick Teske and wife resided upon and had a homestead estate in a part of the northwest quarter of section 24, township 21 north, range 2 west of the sixth P. M., in Madison county, Nebraska. This quarter section of land was a part of the land which by the terms of said oral agreement Carl was to have at the death of his parents. Mrs. Teske died in 1896, and a few months thereafter Frederick Teske, in violation of said agreement and without consideration, conveyed said quarter section to Martha Dittberner, their daughter. Thereupon Carl Teske brought an action against his father and sister to set aside said conveyance and enforce specific performance of said oral agreement. In due time the case reached this court, and during the pendency thereof in this court Frederick Teske died. This court finally held the oral agreement void as to the homestead estate of Frederick Teske, and valid and enforceable as to the remainder of the land. See *Teske v. Dittberner*, 70 Neb. 544. In obedience to a mandate from this court, the district court entered a decree awarding the homestead estate of Frederick Teske to Martha Dittberner and the remainder of the land to Carl Teske, and upon a motion of the plaintiff appointed commissioners to appraise and set apart

the homestead estate of Frederick Teske. The commissioners were directed to include the dwelling house, barn and outbuildings, and land contiguous thereto, not exceeding in all \$2,000 in value as of the date of January 4, 1893. The commissioners appraised the buildings and land, and set apart the east 46 acres of the quarter section as and for the homestead of Frederick Teske. The plaintiff filed objections to this report, one of the grounds of objection being that the court erred in fixing January 4, 1893, as the date when the value of the homestead should be ascertained. The objections were overruled and the report of the commissioners confirmed. Plaintiff has appealed.

The principal question presented by this appeal is: Did the district court err in directing that the homestead estate of Frederick Teske should be ascertained and set apart as of the date of January 4, 1893. The plaintiff contends that the homestead should be ascertained and set apart as of the date of the conveyance to Mrs. Dittberner. As the land had risen in value, this would have given a smaller quantity of land for the homestead. Mrs. Dittberner would have received less land, and Carl Teske correspondingly more land, if the homestead had been ascertained as of that date. By the former judgment of this court in *Teske v. Dittberner, supra*, the oral agreement was held void as to the homestead estate of Frederick Teske. If the entire quarter section at the time of the making of the oral agreement had not exceeded in value the sum of \$2,000, then the contract would have been void as to the whole of that quarter section. Plaintiff contends that the rise in value would have withdrawn from the void contract all that portion of the quarter section which by reason of the rise in value exceeded in value the sum of \$2,000 at the date of the conveyance to Mrs. Dittberner. In other words, the mere rise in value of the land would make valid that which was before void. By the same process of reasoning, if the subject of the contract had been a single tract of 160

acres of the value of \$4,000 at the time the contract was made, and if the land had declined in value until it did not exceed \$2,000, the contract would become void in toto, although it was, when made, valid as to land of the value of \$2,000. The mere decline in value of the land would render void a contract which was before valid. Such, we think, is not the rule. A contract that is void has no life and no validity, and the mere enhancement in the value of the land cannot breathe life or validity into it. A contract for the sale of land, valid when made, does not become void by the rise or fall in the value of the land. Whether the contract was valid or void must be determined at the date of its execution. If void when made, it remains void; and, if valid when made, it remains valid. The quantity of land to be affected by the contract or the land as to which it was void and as to which it was valid must be determined as of the date of the execution of the contract. *Dye v. Mann*, 10 Mich. 291. The district court properly directed the ascertainment in setting apart the homestead as of the date of the contract, January 4, 1893.

In the report of the commissioners there is contained a statement to the effect that they find the value of the dwelling house and the appurtenances to be \$2,000. Defendants contend that this is equivalent to a finding that the value of the buildings with the land upon which they stood was of the value of \$2,000, and that therefore no more than the ground upon which the buildings stood should have been included in the homestead. An examination of the entire report shows however that they found separately the value of each one of the buildings as of the date of January 4, 1893, and that the aggregate value of these buildings was \$1,195, and they found the value of the land on that date, exclusive of the buildings, to be \$17.50 an acre. Forty-six acres at that rate would amount to \$805, which, together with the value placed upon the buildings, amounted to exactly \$2,000. We think it is plain that the commissioners in making the

said statement had in mind the 46 acres of land and the buildings thereon. To ascertain the meaning of any part of the report the whole of it should be examined, and resort should not be had to a single isolated sentence. Applying this rule, it clearly shows that this contention of the plaintiff is groundless.

We find no error in the record. The judgment of the district court is right, and we recommend that it be affirmed.

EPPERSON, C., concurs.

By the Court: For the reasons given in the foregoing opinion, the judgment of the district court is

AFFIRMED.

BARNES, J., dissenting.

I am unable to concur in the opinion of my associates. When this case was before us on a former occasion we held that the contract by which Frederick Teske agreed to convey all of his farm in Madison county, Nebraska, to his son Carl Teske, was valid, and binding on him as to all of the land therein described, except his homestead interest, and was void as to that interest only, because it was not signed and acknowledged by his wife, who was then living. The homestead interest then was what was retained by Frederick and his wife, and they undoubtedly were entitled to have it admeasured and set off to them at any time they chose to demand it. They made no such demand, but delivered possession of all of the land embraced in the contract to Carl, and lived with him for many years on the whole tract in accordance with the terms of the contract. Frederick finally became dissatisfied about some unimportant matter, when he left the home and went to Mrs. Dittberner's, to whom he then conveyed the whole of the land embraced in the contract. Now, having held that Frederick was bound by the contract to convey to Carl all of the land

except so much as would constitute a homestead, or in other words, his homestead interest, it follows that he could convey nothing to Mrs. Dittberner beyond that interest. Therefore, it seems plain that she obtained nothing by the deed in excess of that interest, which was so much of the land in value and extent as would then amount to \$2,000. This she was then, and not before that time, entitled to have admeasured and set off to her. I am of opinion that we should so hold. To determine otherwise and declare that she was entitled to have so much of the land as would amount in value and extent to \$2,000 at a date many years before she acquired any interest therein, would be to give her more than she received by Frederick's conveyance, and would result in depriving Carl of a portion at least of what he had earned, and was justly entitled to receive under his contract.

It therefore seems clear to me that the judgment of the trial court should be reversed and the cause remanded, with instructions to appraise the land and admeasure and set off to Mrs. Dittberner so much of it as at the date of her deed would amount in extent and value to \$2,000.

**FIRST NATIONAL BANK OF TEKAMAH ET AL., APPELLEES,
v. LINNIE MCCLANAHAN, APPELLANT.**

FILED MARCH 5, 1909. No. 15,535.

1. **Homestead, Proceeding to Set Off: STRIKING ANSWER.** On the day set for hearing on a petition filed by a judgment creditor under provisions of section 6 of the homestead act (Comp. St. 1907, ch. 36) to have the judgment debtor's homestead ascertained and set off, the wife of the judgment debtor filed an answer in which she set forth that the judgment debtor had deserted his family, and other facts showing her entitled to claim the homestead exemption, and also alleged that she and her husband each owned an undivided one-half interest in the premises levied upon, and claimed the homestead exemption out of the husband's undivided interest, which answer was stricken from the files upon the

First Nat. Bank of Tekamah v. McClanahan.

ground that the statute did not require the filing of an answer, and that the homestead claims set up in the answer were different from that contained in the notice to the officer making the levy. *Held* to be error.

2. **Homestead: SELECTION.** The undivided half interest of a husband in lands owned by himself and wife as cotenants is subject to homestead exemption.
3. ———: ———. When a husband deserts his wife and family, leaving them in the possession of a homestead, the wife is entitled to the benefit of the same homestead exemption that existed in her husband at the time of his desertion.

APPEAL from the district court for Burt county:
WILLIS G. SEARS, JUDGE. *Reversed with directions.*

Smyth & Smith, E. O. Kretsinger and Singhaus & Clark, for appellant.

Hopewell & Hopewell, contra.

GOOD, C.

Plaintiffs, who are judgment creditors of Andrew J. McClanahan, levied upon and advertised for sale as the property of said McClanahan the southeast quarter of section 11 and the south half of the southwest quarter of section 12, all in township 20 north, range 11 east of the sixth P. M., in Burt county, Nebraska. Defendant, who was the wife of said Andrew J. McClanahan, notified the sheriff that she claimed a homestead interest in the south half of said southeast quarter of section 11 and that part of the south half of the southwest quarter of section 12 which had not been washed away and destroyed by the Missouri river. Plaintiffs, pursuant to the provisions of section 6 of the homestead act, filed a petition for the ascertainment and setting off of defendant's homestead. On the day fixed for the hearing on said petition defendant filed an answer in which she set forth that she and her husband each as tenants in common owned an undivided one-half interest in said south half of the southeast quarter of section 11 and the south half of the south-

west quarter of section 12. She also alleged that her husband had deserted her and her family, and facts showing that she and her husband had occupied said land as a homestead prior to his desertion, and that she and her family had continuously occupied it as a home since his desertion. She asked that the homestead be set off out of the undivided half interest of her husband in said lands. Plaintiffs moved to strike the answer from the files upon the grounds: First, that the statute did not require the filing of an answer; and, second, that the homestead claim was different from that set forth in the notice served upon the sheriff. On the same day the defendant in open court asked leave to serve upon the sheriff an amended notice of her homestead claim to correspond with the facts set up in her answer. The trial court sustained this motion upon condition that defendant pay all the costs of the proceedings since the issuance of the execution and pay an attorney's fee of \$25 to plaintiff's attorneys. Defendant excepted to the conditions imposed, and filed in the office of the clerk of the court an amended notice directed to the sheriff setting out her homestead claim in the same manner as she had in her answer; but she failed and neglected to comply with the conditions imposed as to payment of costs and attorney's fees. The defendant filed a motion to set aside the order of the court granting her leave to file an amended notice of homestead in so far as it imposed the terms of payment of costs and attorney's fees. This motion was overruled, and the motion of plaintiff's to strike defendant's answer was sustained. The court then entered an order sustaining plaintiff's petition for appointment of appraisers on the original notice given to the sheriff, and appointed three freeholders to appraise and set off the defendant's homestead. The south half of the southeast quarter of said section 11 and that portion of the south half of the southwest quarter of said section 12 that had not been destroyed by the Missouri river was appraised at \$6,800, and the appraisers reported that said

premises could be divided and the homestead set off without material injury to the premises. To this report the defendant objected, and moved to set the same aside upon the following, among other, grounds. First, that the court erred in striking defendant's answer and in refusing to permit defendant to serve an amended notice except upon the terms imposed by the court; and that the court had abused its discretion in imposing the terms of payment for attorney's fees and costs. The objections and motion were overruled, the report approved, and the appraisers ordered to set off the defendant's homestead out of the appraised lands. The appraisers set off to the defendant as her homestead the land contained in the south half of the southwest quarter of section 12, comprising a trifle less than 21 acres. To this report the defendant objected, and moved to set the same aside for the same reasons assigned in the objections and motion directed against the first report of the appraisers, and upon the further ground that the value placed upon the land by the appraisers was greatly in excess of its real value; that the court erred in overruling the objections to the first report of the appraisers, and that by the action of the appraisers the defendant's homestead had been set off out of the lands owned by her and her husband, instead of the lands of her husband, and that half of the value of the lands set off was represented by the land owned by her. This motion and objections were overruled, and the report confirmed, and execution ordered to be enforced against all the land levied upon except that which had been set apart as a homestead. The defendant duly excepted to all the adverse rulings of the court on all of her motions and objections, and has removed the case to this court by appeal.

Defendant complains of the action of the trial court in striking her answer from the files and in denying her leave to serve on the sheriff an amended notice claiming a homestead from the undivided interest of her husband in the land except upon the payment of costs and attor-

First Nat. Bank of Tekamah v. McClanahan.

ney's fees. Plaintiffs insist that in such proceedings no answer is required, and that the terms imposed as a condition to serving an amended notice were within the discretion of the court and were reasonable. In proceedings by execution creditors to have the debtor's homestead ascertained and set off, the statute requires the creditor to file a petition, but there is no requirement of the statute that defendant shall file an answer. In *France v. Hohnbaum*, 73 Neb. 70, it was held that in such a proceeding the procedure is within the discretion of the district court, and, unless an abuse of this discretion is shown, the reviewing court will not interfere. In that case the judgment debtor filed an answer which the trial court refused to strike from the files on the motion of the judgment creditor. The ruling of the trial court was sustained. We are of the opinion that, where there are any peculiar features surrounding the rights of the homestead claimant such as appear in this case, it was entirely proper and perhaps necessary for the defendant to file an answer setting forth in the concise manner her homestead claim. In no other way can we perceive how the nature of defendant's homestead claim, and that it should be carved out of an undivided half interest in the real estate, could be properly brought to the attention of the court. The striking of defendant's answer was an abuse of discretion, as we view it, and constituted prejudicial error to the defendant, as we shall hereafter see.

With reference to the refusal of the trial court to permit the defendant to serve an amended notice except upon terms, we perceive no error for the reason that there was no occasion for the serving of an amended notice. The object of such notice to the officer having the execution is to stay him in his proceeding to sell the land, and warn the judgment creditor that a homestead is claimed. No further steps in the proceeding to sell can then be had until the judgment creditor files his petition and has the homestead appraised and set off. The notice has served its purpose. The sheriff was prevented from taking any

further steps, and the judgment creditor was apprised that a homestead claim had been made against the land. He acted upon the notice and filed a petition to have the homestead set off. No other or further notice to the sheriff was necessary. It was then a matter for the court to determine from the petition of the plaintiffs and such other pleadings, as might be properly filed in the proceeding.

The defendant complains because the homestead set off, although appraised at \$2,000, was really of the value of but \$1,000, because in the appraisal was included property which was not subject to the homestead claim. If defendant was the owner of an undivided one-half interest in the land which was set off as a homestead, and if she was entitled to have the homestead carved out of her husband's undivided half interest, it is clear that the defendant has been awarded a homestead of the value of \$1,000, while the value limit fixed by statute is \$2,000. In many states a homestead cannot be acquired in lands that are held in co-tenancy, but such is not the rule in this state. One of the principal objects of the homestead law is to protect the debtor and his family in the possession of a home. The homestead law has always been liberally construed in this state with a view to promoting its beneficent purposes. It is no concern of the creditor that the debtor's interest in the land is an undivided interest or that it may be less than a fee title to all the premises out of which he claims a homestead. In *Giles v. Miller*, 36 Neb. 346, it was held that "a homestead may be claimed in lands held in joint-tenancy," and that "an undivided interest in real estate, accompanied by the exclusive occupancy of the premises by the owner of such interest and his family as a home, is sufficient to support a homestead exemption." Under the rule laid down in that case Andrew J. McClanahan was entitled to a homestead exemption out of his undivided half interest in the lands in controversy. When he deserted his wife and family, leaving them in the possession of the home, the

First Nat. Bank of Tekamah v. McClanahan.

right to claim the same homestead exemption passed to his deserted wife and family. Again, section 2 of the homestead act (Comp. St. 1907, ch. 36) authorizes the selection of the homestead from the separate property of either the husband or wife, but from the property of the wife only with her consent. In this case the wife has not consented, and is strenuously objecting to the homestead being selected from her separate property. Without that consent it cannot be taken from her property. It naturally follows that the homestead set off to the defendant, while appraised at \$2,000, is of the value of \$1,000, for her undivided half interest in the land set off as a homestead cannot be considered as a part of the homestead.

We recommend that the orders of the district court directing the appraisement, and setting off of the homestead and the confirmation of the report of the appraisers be reversed and set aside and the cause remanded, with directions to restore to the files defendant's answer, and for further proceedings according to law.

DUFFIE, EPPERSON and CALKINS, CC., concur.

By the Court: For the reasons given in the foregoing opinion, the orders of the district court directing the appraisement and setting off of the homestead and the confirmation of the report of the appraisers are reversed and set aside and the cause remanded, with directions to restore to the files defendant's answer, and for further proceedings according to law.

JUDGMENT ACCORDINGLY.

**JOSIAH E. REED, APPELLEE, V. VILLAGE OF SYRACUSE,
APPELLANT.**

FILED MARCH 5, 1909. No. 15,465.

1. Master and Servant: INJURY: NEGLIGENCE: QUESTION FOR JURY.

Where a village, engaged in supplying water and manufacturing gas for its own use and for sale to private consumers, so installs a tank for the storage of gasoline that it leaks into the pumping pit of the waterworks and causes an explosion in which an employee of the village is injured, the question whether such explosion is attributable to negligence on the part of such village is for the jury.

2. ———: ———: CONTRIBUTORY NEGLIGENCE: QUESTION FOR JURY.

Where an explosion of gasoline in the pumping pit of a village waterworks followed the lighting of a match by an employee who had no knowledge of the presence of the gasoline, but detected an odor of gas which he supposed was escaping from a fixture, and the evidence shows that such is the ordinary method to detect leaking fixtures, the question whether the employee was guilty of contributory negligence in striking the match is for the jury.

3. ———: ———: ASSUMPTION OF RISK. The danger of an explosion from the presence of gasoline in the pumping pit of a waterworks station, of which an employee had no notice, is not one of the ordinary and obvious hazards of his employment which he assumes by accepting such employment.

4. ———: ———: LIABILITY. A water commissioner appointed in pursuance of the provisions of subdivision 15, sec. 69, art. I, ch. 14, Comp. St. 1903, has, subject to the supervision of the board of trustees, general management and control of the system of waterworks, and the village owes to persons employed by him in connection with such business the duty to provide a reasonably safe place for the conduct of their employment.

5. Appeal: HYPOTHETICAL QUESTION: REVIEW. Where a hypothetical question is objected to on the ground that it is an inaccurate statement of the facts which the evidence tends to establish, such objection will not be considered on appeal unless the argument points out the particular defect in the question.

6. ———: DAMAGES: INSTRUCTIONS. Where the evidence clearly shows that the injuries suffered by the plaintiff are of a serious and permanent character, and the damages awarded, it is conceded, are not excessive in amount, it is not prejudicial error for the court to instruct the jury that the plaintiff is entitled to recover damages for his impaired earning capacity.

APPEAL from the district court for Otoe county:
PAUL JESSEN, JUDGE. *Affirmed.*

D. P. West and John C. Watson, for appellant.

Pitzer & Hayward, contra.

CALKINS, C.

The village of Syracuse had for some years operated a system of waterworks, and in 1904 began the manufacture of gas for municipal use and for sale to private consumers. The pump for supplying water was installed in a pit in the pumping station, and a large tank in which to store gasoline for the manufacture of gas was buried in the ground outside, but near the pit of the pumping station. The plaintiff was a helper employed by the village water commissioner to, among other things, fire the boiler and manage the engine and pumps while pumping water. August 24, 1904, in the execution of his said duties, he descended into the pit to start the pumps. There was a gas burner placed in this pit to light the same at night and during dark days. The plaintiff detected, as he says, a slight odor of gas, and, thinking the fixture might be leaking, lighted a match to test the same. A violent explosion followed, in which plaintiff was severely burned, suffering serious and permanent injuries to his health, strength and ability to labor. He brought this action, alleging that the explosion was caused from gasoline which had leaked from the storage tank, and, percolating through the earth, penetrated the walls of the pumping pit, as the result of the negligence of the defendant in the installation of said storage tank. There was a verdict for the plaintiff, and from a judgment thereon the defendant appeals.

1. At the close of plaintiff's case the defendant asked the court to direct a verdict on the ground that the undisputed evidence failed to show the defendant guilty of neg-

ligence. The storage tank was constructed of 3-16 inch sheet iron or steel, and was 35 feet long and 5½ feet in diameter, and cylindrical in shape. The evidence established that to keep such tanks from straining and consequent leakage at the seams they should be unloaded from the car by means of cradles resting on timbers cut to fit the circumference of the tank; that a foundation should be prepared, either by building piers concave in form to fit the tank, or placing concave iron or wooden saddles upon level piers of masonry; that a clearance space should be left under the pipes running from the tank to prevent the same from being wrenched by the uneven settlement thereof, and that in all cases a test of the tank and pipe work should be made after the installation thereof to detect leakage. None of the above precautions were observed by the defendant in installing the tank in question. It was rolled off the cars upon timbers and into a hole dug in the ground without preparing any foundation for it to rest upon. There were no precautions taken to prevent the wrenching of the connecting pipes by the unequal settlement of the tank, and a test of the work was entirely omitted. Upon examination of the tank after the explosion, it was found to be leaking in several places, especially at the pipe connections, and the earth around the tank was more or less saturated with gasoline. The pump pit was walled with ordinary rubble masonry, plastered on the inside with cement. It was not of a design calculated to keep water out of the pit, and there was more or less seepage of ground water into the pit, there being seven or eight inches of water in the pit at the time of the explosion. There being no other source indicated from which it could have entered, the conclusion is almost irresistible that the gasoline from the leaky tank had seeped through the ground and into the pit in the same manner and perhaps with the water which had come through the walls. These facts were clearly sufficient to justify the court in submitting the question of defendant's negligence to the jury. Villages that lawfully engage in

Reed v. Village of Syracuse.

commercial enterprises are liable to the public the same as individuals. *Todd v. City of Crete*, 79 Neb. 671.

2. It is argued that the plaintiff's own evidence established contributory negligence on his part, and that for that reason the court should have directed a verdict for the defendant. It is claimed that the act of the plaintiff in lighting the match constituted such contributory negligence. While the act of lighting a match where the presence of any considerable quantity of inflammable gas is suspected would be carelessness of a culpable kind, it is in evidence that such is the ordinary way of detecting slight leakages from fixtures or burners. The plaintiff testified that he only discovered a slight odor of gas, which he supposed was produced by a small leak in the vicinity of the fixture. The facts therefore presented a case peculiarly suitable for submission to the jury, which is ordinarily the judge of what constitutes negligence and contributory negligence, and which should not be constrained by the court except in cases so plain that different minds might not honestly draw different conclusions.

3. It is argued by defendant that, if a servant agrees to undertake employment in a business conducted in a certain way, he thereby assumes all the obvious dangers and hazards of such business, and that therefore the plaintiff in this case assumed the risk of the injury which he suffered. It is not pointed out how the presence of gasoline, which had escaped from a leaky and improperly installed tank and percolated through the earth to the pumping pit of the waterworks, is one of the ordinary and obvious dangers and hazards of operating the pumps of said waterworks. Such danger appears to us neither ordinary nor obvious, and it was not, therefore, assumed by the plaintiff.

4. The defendant insists that the relation of master and servant did not exist, and for that reason there should have been no recovery. The charter act under which the defendant was organized provided for the appointment of a water commissioner, concerning whom it is enacted that

he shall, under the supervision of the board of trustees, have general management and control of the system of waterworks. Comp. St. 1903, ch. 14, art. I, sec. 69, subd. 15. Such officer was appointed, and he employed the plaintiff. That the city paid the water commissioner a gross salary, out of which he paid the plaintiff, does not alter the case. The status of the water commissioner was fixed by law. He cannot, therefore, be an independent contractor, and the doctrine of such cases does not apply.

5. The defendant assigns as error the action of the court in overruling objections to certain hypothetical questions that were propounded to Mr. Munn, a civil engineer, and to Mr. Mount, a boiler manufacturer. It is objected that these questions did not correctly assume the facts which the evidence introduced established or tended to establish. The defendant does not point out any fact included in these questions which should have been omitted, nor does it specify any fact omitted which should have been included. It therefore fails to present any question to the court for its consideration. We have, however, examined these questions; but have been unable ourselves to discover any defect which is open to these objections.

6. Objection was made to the seventh instruction, given by the court on its own motion, on the ground that there was no evidence to "show what caused the leakage or that there was, in fact, any leakage." This is sufficiently disposed of by what we have already said in reference to the refusal of the court to direct a verdict.

The objection to the eighth instruction, that it assumed the existence of the relation of master and servant, is disposed of by paragraph 4 of this opinion.

The eleventh instruction told the jury that they had a right to allow the plaintiff compensation "on account of his impaired earning capacity in the future." This is complained of as allowing the jury to come into the field of mere probability and conjecture. The injuries suffered by the plaintiff were of a most serious nature and perma-

nent in their character. He was burned over two-thirds the entire surface of his body, and his survival violated all the probabilities of medical prognosis. There were permanent changes in the structure of some of his organs, and adhesions of the muscles of his hands and one of his arms. The functions of the skin over a large portion of his body were permanently impaired, and his nervous system greatly weakened. It was frankly admitted upon the trial that his injuries were of a nature so grave that, if he was entitled to recover in any amount, the award of the jury was not excessive, and the defendant could not for this reason have been prejudiced by the instruction complained of.

Other objections are made to other instructions, and to the refusal of the court to give various instructions requested by defendant; but they raise no questions not hereinbefore determined, and we do not deem it necessary to consider them in detail.

We therefore recommend that the judgment of the district court be affirmed.

DUFFIE, EPPERSON and GOOD, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

CHARLES E. GIBSON, APPELLANT, v. LEVI GUTRU ET AL.,
APPELLEES.

FILED MARCH 5, 1909. No. 15,504.

1. **Receivers: POWERS.** Where a note made payable to the order of a corporation is really owned by a third party, and such corporation becomes insolvent, its effects passing to a receiver, such receiver may indorse such note to the real owner, and thereby vest in him the legal title thereto.
2. **Mortgages: RENEWALS: ACTION.** Where a defendant gave to the holder of a promissory note secured by mortgage a renewal note,

Gibson v. Gutru.

the sole consideration of which was the original note and mortgage, such holder of said original note is not entitled to maintain an action on the renewal note after a decree and sale has been had in a suit upon the original mortgage, and while such decree and sale remain in force and unsatisfied.

8. Notes: ACTION: DEFENSES: QUESTION FOR JURY. Where the defense to an action upon a promissory note transferred for value before maturity and in the due course of business is that the indorsee had notice of a defect in the consideration, the court should not instruct the jury for the defendant, unless the uncontradicted evidence shows that the plaintiff had such notice, or establishes facts from which the only reasonable inference to be drawn is that he had such notice or took the paper under such circumstances as show bad faith or a dishonest purpose on his part.

APPEAL from the district court for Madison county:
ANSON A. WELCH, JUDGE. *Reversed.*

James M. Nichols, C. A. Robinson, H. M. Sinclair and W. D. Oldham, for appellant.

H. Halderson, contra.

CALKINS, C.

In 1894 the defendant purchased a tract of land situated in Box Butte county subject to a principal mortgage of \$275 and to a second or interest mortgage for \$18. Default had been made upon this mortgage, and after the commencement of a suit to foreclose the same the defendant applied for a renewal to the Globe Investment Company, in whose name the original mortgage appears to have been held. In response to that application the company made a statement of the amount due, and offered to renew the note for \$275 upon payment by the defendant of interest and costs. The note in suit was executed in pursuance of such arrangement, and the defendant paid a certain amount of money to apply on the interest and costs. But a dispute appears to have arisen as to the amount which should be paid on that account, the representative of the investment company demanding a payment of \$19 more than defendant had paid, and this demand

culminated in a threat made on the 6th day of March that, if he failed to pay the sum at once, said company would complete the foreclosure of the loan. About this time the Globe Investment Company failed, and a receiver was appointed to wind up its affairs. It appears that the note in question did not belong to the Globe Investment company, but to one Chaplin of Georgetown, Massachusetts, who on the 21st day of October, 1896, sold the same to the plaintiff. A dispute having arisen between the plaintiff and the receiver regarding the payment of costs claimed to have been advanced by the receiver upon other paper purchased by the plaintiff, the note in question was not immediately delivered; but on June 13, 1899, the plaintiff and the receiver having come to an understanding upon these matters, the latter indorsed the note in suit to the plaintiff. Meanwhile the foreclosure suit, which was in the name of one J. L. Moore, an officer and director of the investment company as trustee, proceeded to a decree and sale, at which the property was bid in in the name of said Moore as such trustee. This sale was confirmed, but no deed was executed in pursuance thereof. Upon these facts the court below directed a verdict for the defendant, and the plaintiff appeals.

1. The defendant contends that the indorsement of the note in question to the plaintiff by the receiver of the insolvent company, in whose name it was taken, was insufficient to vest the legal title thereto in the plaintiff. No authorities are cited to sustain this proposition, nor are we referred to any legal principle by which it is upheld. The legal title to the note in question was first in the investment company, and it passed to the receiver by virtue of his appointment. When he indorsed it to the plaintiff, the legal title vested in the latter. The equitable title was in Chaplin, and when the receiver was appointed in September, 1895, he held that title for the benefit of Chaplin. When in October, 1896, Chaplin made the sale to plaintiff, the receiver then held the title for the benefit of the plaintiff; and when the receiver afterwards

indorsed it to the plaintiff, the legal and the equitable title were vested in the same person. Since at the beginning of this action the plaintiff had both the legal and the equitable title, the fact that some of his indorsers actually held the same for the benefit of another is immaterial. The only absolute property or right of ownership which the law recognizes and which courts of law protect by their legal actions and remedies, whether in land or things personal, must arise and be acquired in certain fixed, determinate methods, which alone constitute the titles known to the law, using that word in its strict and true sense as a means of acquiring property. Pomeroy, Equity Jurisprudence (3d ed.), sec. 366.

2. The plaintiff contends that the facts shown concerning the status of the foreclosure suit would not constitute a defense to this note in the hands of the original payee. It is argued that the evidence shows that the defendant has lost nothing by the failure to satisfy the original mortgage, and that he sold the land with the understanding that said mortgage was satisfied, and received full compensation for the same without deducting anything on account of the existence thereof. Whether the evidence would justify this conclusion it is not necessary for us to determine, for we think the defendant was entitled to have such mortgage satisfied, and that an action could not be maintained upon the renewal note while the decree upon the original mortgage was in full force and effect.

3. But a failure of consideration is not a defense to a negotiable note in the hands of a *bona fide* holder for value, who acquired it before maturity in due course of business and without notice of such defect. The note in question was dated September 1, 1894, and was due September 1, 1899, so that whether the date of the purchase or actual indorsement is taken as the date of the transfer the plaintiff received it before maturity. The plaintiff is the only witness who testifies to the facts of the transaction

by which he became the owner of the paper. He states that he had been in the business of handling western land and mortgages for some 20 years; that he bought the note in question on October 21, 1896, from George J. Chaplin, paying for the same in cash by a check which he forwarded him by mail on October 21, 1896, covering the cost of this and other notes that he purchased from him at the same time; and that on June 13, 1899, the note was indorsed and delivered to him by Mr. Wyman, receiver of the insolvent company. He states that he had no knowledge of any defense or claim of defense to the note.

It is to be observed that the real question was whether the plaintiff knew that this was a renewal note, and that the original note which it was given to renew had not been satisfied, or whether he was under the circumstances guilty of negligence or of want of proper caution. It is claimed by defendant that the evidence shows that the plaintiff knew of the fact of this being a renewal note at the time he testified, and that it therefore follows that he must have known it at the time of the purchase. But this is not necessarily true. The questions whether the holder of current negotiable paper has taken it with or without notice of defenses between prior parties, and whether he has exercised good faith in the transaction or has been guilty of negligence or a want of proper caution, are always questions of fact to be submitted to a jury when the evidence is conflicting or when from the facts proved different minds might honestly draw different conclusions. 1 Thompson, Trials, sec. 1239. And, while we deem it unnecessary to determine whether the facts before the court would have sustained a verdict for the defendant had the question been submitted to the jury, we are satisfied that it did not justify a peremptory instruction by the court for the defendant. The only way a conclusion that the defendant had notice of this fact could be reached would be by inferences drawn from the facts to which he testified, and these inferences, if made at all, must be made by the jury.

In re Estate of Pope.

The court should have only directed a verdict when the uncontradicted evidence established the fact of the plaintiff's knowledge of the existence of the defense to said note, or facts from which the only reasonable inference to be drawn was that he had such knowledge or took the papers under such circumstances as evidenced bad faith or a dishonest purpose on his part.

We therefore recommend that the judgment of the district court be reversed and the cause remanded.

DUFFIE, EPPERSON and GOOD, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED.

IN RE ESTATE OF JAMES H. POPE.

FRED C. CAULTON, APPELLEE, v. LYDIA E. POPE, EXECUTRIX, APPELLANT.

FILED MARCH 5, 1909. No. 15,519.

1. **Executors and Administrators: DEVISE: CROPS.** Unless reserved, crops standing upon the ground pass to the devisee and not to the executor. *Andersen v. Borgaard*, ante, p. 8, followed.
2. **Wills: DEVISE: CROPS.** Where land is let and rent reserved in a share of the crops, the title to the land and to the landlord's share of the crops are not severed, but remain in the landlord and pass by his devise of the land.
3. **Executors and Administrators: BOND: DEVISE: RIGHT OF POSSESSION.** Where an executor, who is also residuary legatee, gives the bond provided by section 165 of the decedent act (Comp. St., ch. 23) conditioned to pay debts and legacies, it is the duty of such executor, upon giving such bond, to surrender the possession of property specifically devised to another, and such executor is by the giving of such bond estopped to claim the right of possession of such property until the final settlement of the estate.
4. ———: **CLAIMS: STIPULATIONS.** Where a devisee of specific property files a claim in the county court against the estate of his testator,

In re Estate of Pope.

in which is included a claim against the executor for money received from crops growing upon the land so devised, and upon appeal to the district court it is stipulated that no question will be raised as to whether such claim is a personal or official liability on the part of the executor, this court will not disturb a judgment directing the allowance of such claim on the ground that an action should have been brought against the executor, the question as to whether the stipulation is an attempt to confer jurisdiction not being raised.

APPEAL from the district court for Merrick county:
JAMES G. REEDER, JUDGE. *Affirmed.*

John J. Sullivan and Louis Lightner, for appellant.

Charles G. Ryan and Martin & Ayres, contra.

CALKINS, C.

James H. Pope died leaving a will, by the terms of which he devised to the plaintiff 320 acres of land, upon which there was at the date of his death a growing crop of corn. The remainder of his estate was devised to the defendant, his widow. The allowance of the will having been contested by the plaintiff, the defendant was appointed special administratrix and continued so to act until, the will being established, she was appointed executrix. She then gave a bond under section 165, ch. 23, Comp. St. 1903, conditioned to pay all the debts and legacies of the testator, and qualified as such executrix. While acting as special administratrix, she took possession and removed from the premises devised to the plaintiff the above mentioned crop of corn, which after her qualification as executrix she on the 26th day of June, 1905, sold for \$884.02. The plaintiff filed a claim against the estate of the deceased in the county court for various items, including the value of this corn, which was there contested by the executrix. The cause, being removed to the district court by appeal, was referred to the Honorable A. M. Post to hear and determine. Before the referee it was stipulated that, "as to the liability of said Lydia E. Pope in the corn mat-

ter herein presented for determination, no question will be raised as to whether it is a personal or official liability on the part of the defendant in the event of there being any liability found." The referee found: First, that upon the death of Pope the plaintiff became seized of the land devised to him, together with the corn growing thereon, subject to the rights of the personal representatives of said deceased to the possession of said property pending the settlement of said estate; second, that the said Lydia E. Pope acted within her rights as special administratrix in taking possession of said corn, but that her action in selling the same after giving bond as residuary legatee was a conversion of said property, for which she was liable to claimant; and, third, that the district court was in the exercise of its appellate jurisdiction clothed with the plenary powers of the county court in examination and allowance of claims, and should upon reasonable terms and in order to avoid circuity of action direct the allowance of said claim on appeal. The report of the referee was affirmed by the district court, and from so much of the judgment thereon rendered as required defendant to account for the corn in question said defendant appeals.

1. The question whether growing crops on land devised by will pass to the devisee under the will or to an executor has recently been considered by this court in the case of *Andersen v. Borgaard*, ante, p. 8. The conclusion there reached was that, unless reserved, crops standing upon the ground, matured or not, pass to the devisee. This we regard as decisive of the principal question in the instant case.

2. The defendant, however, contends that the land devised was leased, and that the estate therein had passed for the time being to the lessee, leaving in the deceased a right to recover rent, but no present estate in the land. It is a general rule that the conveyance of a reversion carries with it the rent accruing and becoming due after the date of such conveyance (*Eiseley v. Spooner*, 23 Neb.

470), but this question it is not necessary to determine in this case. The document referred to as a lease is so denominated upon its face, but it is really an agreement to farm on shares, the so-called tenant agreeing to deliver to the owner of the land a certain portion of the crop raised thereon. In such case the title to the land and to the share of the deceased in the crops was never severed. *Sims v. Jones*, 54 Neb. 769. It follows that the fact that the land was being farmed by a cropper does not prevent the application of the rule in *Andersen v. Borgaard*, *supra*.

3. The defendant argues that under section 202, ch. 23, Comp. St. 1903, which provides that the executor or administrator shall have the right to the possession of the real and personal estate of the deceased until the estate shall have been settled, or until delivered over by order of the probate court to the heirs or devisees, the plaintiff did not have the right of possession of this corn until the estate was settled. It may be conceded that under this section the executor or administrator may ordinarily retain possession of the real and personal property of the deceased until it is judicially ascertained whether all or some portion of such property is necessary to discharge the debts of the deceased. In this case, however, the defendant gave a bond undertaking to pay all debts and legacies, and thereby secured exemption from the provisions of the statute under which an executor is required to return an inventory of the estate. While such a bond does not destroy the lien of the creditor nor operate as a final settlement of the estate (*Thompson v. Pope*, 77 Neb. 338), it estops the obligor from saying that it is necessary to retain property of a devisee or legatee for the purpose of securing or paying creditors. Whatever the creditors of the estate might be entitled to do or to have performed for them, it is clear that an executor and residuary legatee, after having availed herself of the benefits secured by the execution of such a bond, cannot justify her retention of property devised to an-

other on the ground that it may be necessary to use it to pay the debts which she has thus undertaken to discharge.

4. It is contended that the county court had no jurisdiction of the subject of this controversy. It is said that its power must be derived from section 214, ch. 23, Comp. St. 1903, which confers authority to examine, adjust and allow claims against the deceased or against the estate of the deceased, but no power to render a personal judgment against an administrator or an executor either in his personal or official capacity. On the part of the plaintiff it is contended that the stipulation made before the referee, already referred to, eliminates this question from the case. At the time this stipulation was made the referee was entering upon the consideration of the plaintiffs claims against the estate of the deceased. The other items of his claim were clearly against the deceased, and it seems to have been in the minds of the stipulating parties that the claim for the corn did not belong to that class, and that it was uncertain whether it was an official liability of the defendant as executrix or whether it was merely a claim against her personally as an individual. The obvious purpose of the stipulation was to waive formalities, and investigate this question upon its merits with the other questions then before the referee, and to avoid the necessity for bringing other and further actions. It was in this view that the learned referee reached his third conclusion of law that the court might, in order to avoid circuity of action, direct the allowance of said claim in this proceeding, and with that conclusion we are constrained to agree. We reach this result more readily because it involves no substantial right, and a reversal of the judgment would only lead to another suit between the parties, the result of which would be determined by the conclusions at which we have already arrived in this opinion.

The appellant having declined to raise the question whether the stipulation was void as an attempt to confer jurisdiction, that point is not decided.

Curtis-Baum Co. v. Lang.

We therefore recommend that the judgment of the district court be affirmed.

DUFFIE, EPPERSON and GOOD, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

CURTIS-BAUM COMPANY, APPELLEE, v. SAMUEL LANG,
APPELLANT.

FILED MARCH 5, 1909. No. 15,524.

1. **Replevin: DEFENSES: EVIDENCE.** Where a sheriff or constable seizes property by virtue of a writ of attachment regularly issued, and being sued in replevin for the possession of the property by a stranger to the action, justifies under the writ, he is not required to prove the debt of the attaching creditor, except in cases where such property was by him taken from the possession of such stranger to the action.
2. **Attachment: JURISDICTION.** An affidavit for attachment which alleged that the defendant is about to remove his property out of the county with intent to defraud his creditors justifies a justice of the peace in issuing an attachment, and gives him jurisdiction of the property of the defendant seized in the county under such writ when followed by the service provided by section 932 of the code.

APPEAL from the district court for Platte county:
CONRAD HOLLENBECK and JAMES G. REEDER, JUDGES.
Reversed.

A. M. Post and R. P. Drake, for appellant.

R. W. Hobart and Albert & Wagner, contra.

CALKINS, C.

One Dr. Neef, of Humphrey, in Platte county, on about the 15th day of April, 1906, purchased of the Bennett Company of Omaha a piano, giving his note therefor, which contained a provision that the title to the piano and right of possession should not pass from the Bennett

Company until the note was fully paid. On the 13th day of September, 1906, this and other property was seized by the defendant, a constable in and for Platte county, who claimed the right to take the same under orders of attachment issued by a justice of the peace against the property of the said Neef. On the 10th day of November, as the constable was about to sell the property in question, the plaintiff, to whom the note mentioned had been indorsed, brought this action in replevin for the possession of said piano. On the trial of the case in the district court the plaintiff offered in evidence the note in question and the indorsement thereof, but did not attempt to prove that the same was filed with the clerk of the county with the affidavit required by section 26, ch. 32, Comp. St. 1905. The defendant offered in evidence the docket of the justice of the peace and the files in the several cases in which it was claimed attachments were issued, including such writs of attachment and the return thereon, which were by the court excluded, and a verdict directed for the plaintiff. From the judgment rendered upon this verdict the defendant appeals.

1. Error is assigned in various forms, but, reduced to its simplest terms, the question is whether the court erred in excluding dockets of the justice and the papers in the various attachment cases. It appears from an inspection of the record that these papers were first admitted in evidence, and that the defendant then asked permission of the court "to correct the clerical error changing the word August to October." This was denied, and the papers excluded. Whatever may have been the actual facts, we are bound by the record presented to us, and an examination of the papers attached to the bill of exceptions and certified to be the papers which were offered and excluded shows that each of the cases was continued to the 29th day of October. If in fact these papers as offered and rejected by the court showed the cases continued to the 29th day of August, there has been an error in the settling of the bill of exceptions, behind which we cannot go.

The papers offered tended to show that on the 13th day of September, 1906, suits were begun against Neef before a justice of the peace for Platte county, and affidavits for attachment filed, which charged that "he had removed from the county to avoid summons, and is a nonresident of the county, and is about to remove his property or a part thereof out of the county with the intent to defraud his creditors"; that an undertaking was given in each case, upon which attachments were issued against the property of Neef and placed in the hands of the defendant as constable; that he on the same day levied said attachments upon the said piano and other property found in the residence last occupied by Neef in the village of Humphrey; that the return upon the summons showed that the defendant Neef was not found in the county, and the justice adjourned the cases until the 29th day of October, whereupon the plaintiff proceeded to publish in a newspaper printed in the county a notice, stating the names of the parties, the time when and by what justice of the peace and for what sum the order was issued; that on the 29th day of October the justice rendered judgment against Neef and made an order for a sale of the attached property, which the defendant was proceeding to execute on the 10th day of November, when this suit was begun and the property was taken away from him.

The plaintiff contends that it was necessary for the defendant to show, in addition to the facts above mentioned, that the attachment plaintiffs were *bona fide* creditors of Neef. The statute in regard to conditional sales (Comp. St. 1905, ch. 32, sec. 26) makes the same void as to "attaching creditors." *Peterson v. Tufts*, 34 Neb. 8. We do not overlook the rule adopted by this court in *Oberfelder v. Kavanaugh*, 21 Neb. 483, that an officer who in the execution of an order of attachment seized property found in the possession of a stranger to the attachment proceeding, in a subsequent action of replevin by such stranger, is required to establish both the alleged indebtedness of the attachment defendant and the regu-

larity of the proceeding. That rule would apply had the property in this case been taken from the possession of the plaintiff; but the plaintiff having surrendered possession to Neef does not come within the rule, and we are satisfied that it should not be extended to cases in which the officer does not take the property from the possession of a stranger to the writ.

2. It is contended that since section 60 of the code requires an action to be brought in the county where the defendant resides or may be summoned, and the affidavit for attachment sets forth that he is a nonresident of the county, the justice had no jurisdiction. It has already been settled in this state that an absconding debtor is rightly suable by attachment in the county of his late residence where his property remains and is subject to seizure. *Gandy v. Jolly*, 34 Neb. 536; *Smith v. Johnson*, 43 Neb. 754. The fifth ground for attachment before a justice of the peace (code, sec. 925) is that the defendant is about to remove his property or a part thereof out of the county with intent to defraud his creditors. We think the reasoning of the cases above cited applies to this ground of attachment, and that it would render it nugatory to say that the defendant must reside or be served with summons in the county from which he is so attempting to remove his property with intent to defraud his creditors. It follows that an affidavit for attachment which alleges that the defendant is about to remove his property out of the county with intent to defraud his creditors justifies a justice of the peace in issuing an attachment, and gives him jurisdiction of the property of the defendant seized in the county under such writ when followed by the service provided by section 932 of the code.

We therefore recommend that the judgment of the district court be reversed and the cause remanded for further proceedings.

DUFFIE, EPPERSON and GOOD, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED.

WILLIAM D. LASHMETT, APPELLEE, v. JOHN PRALL, APPELLANT.

FILED MARCH 5, 1909. No. 15,537.

1. **Judgment: RES JUDICATA.** Where in a suit in the nature of a creditor's bill it appeared that the judgment creditor was indebted to the judgment defendant upon a promissory note in an amount equal to or greater than the amount of the judgment, and his petition was dismissed on the ground that being so indebted he suffered no injustice from the legal obstacles which he sought to remove, such dismissal does not operate to satisfy the judgment.
2. —: **REVIVOR: DEFENSES.** In a proceeding to revive a dormant judgment by motion, the judgment debtor cannot plead as a defense to such motion an independent cause of action existing in his favor against the judgment creditor.

APPEAL from the district court for Valley county:
JAMES R. HANNA, JUDGE. *Affirmed.*

O. A. Abbott, for appellant.

A. M. Robbins and *C. I. Bragg*, contra.

CALKINS, C.

This was an application to revive a judgment which had become dormant. It appears that, after the recovery of the judgment, a transcript thereof was filed in Loup county, where the plaintiff prosecuted a suit in the nature of a creditor's bill to set aside certain transfers of land which it was alleged the defendant had made without consideration and in fraud of the rights of the plaintiff as a judgment creditor. In such action the defendant interposed the defense that the plaintiff was indebted to him

upon a promissory note for a sum exceeding the amount of such judgment. The district court found for the plaintiff, and the case was brought here, where it was held in an opinion by AMES, C. (2 Neb. (Unof.) 234), that, since the plaintiff was indebted to defendant in a sum equal to or greater than the amount of the judgment, the legal obstacles which he was invoking the aid of a court of equity to remove were inflicting no injustice upon him, and he was not therefore entitled to any relief. The judgment of the district court was thereupon reversed and the action dismissed.

The proceedings of revivor in the instant case were begun in January, 1906, and the defendant, in response to an order to show cause why the judgment should not be revived, set up the proceedings and opinion in the former case, and alleged that the plaintiff was thereby estopped and precluded from alleging or proving that any amount was due plaintiff upon said judgment. There was no allegation in the answer that the note was still owned by defendant, nor that it remained unpaid; but the plaintiff, in a reply filed by him, alleged that more than five years had elapsed "since said pretended note has matured," and that no action had been commenced on the same. This reply, while admitting the proceedings in the former case both in the district and supreme courts practically as alleged in the answer, further set up that, after the filing of said opinion, the defendant filed and this court overruled a motion asking the court to amend and complete its judgment by setting off the amount due on the judgment held by plaintiff against the amount due on the note held by defendant, and render a judgment for the remainder, or, in case such relief be denied, that the cause be remanded with leave to file a petition on the note and have a trial at law. The district court found generally for the plaintiff, and entered an order reviving the judgment, from which the defendant appeals.

1. The defendant contends that the effect of the former decision of this court upon plaintiff's judgment was such

that the plaintiff may not claim any right or have any remedy upon such judgment until he shall show that his debt upon the note has been satisfied. To concede this would be to say that the judgment was conditionally satisfied, a status which, so far as we are advised, is unknown to the law. The former decision of this court did not determine that the existence of the indebtedness upon the note extinguished the judgment, nor that the defendant was entitled to set the same off against the plaintiff's claim under the judgment. In the opinion it was expressly said that the defendant was not seeking to set off his note against the judgment, and that the upholding of his defense left the judgment and whatever legal processes were provided for its enforcement unimpaired. Not only this, but the court upon an application made after filing the opinion, as we have seen, expressly refused to set off the amount due on the judgment against the amount due on the note, or even to remand the cause with leave to file a petition on the note and have a trial thereon at law.

2. The defenses which may be urged against a motion to revive a dormant judgment are not enumerated in the statute, but such motions are undoubtedly governed by the same principles as applied to the writ of *scire facias* when it was used at common law to revive judgments. The rule was that the only allowable pleas to a *scire facias* upon a judgment were: First, *nul tiel* record, under which the defendant might deny the existence of the original judgment or allege that it was entirely void; and, second, payment, including release, satisfaction or discharge of the original judgment. 1 Black, Judgments (2d ed.), sec. 493. Set-off and counterclaim was in no case available as a defense to such a proceeding, and no cases are cited to the effect that any different rule obtains where judgments are revived by motion. It matters not that the court by its former decision sustained the validity of the note, for, assuming the note to be a valid and existing obligation, the plaintiff would not be entitled to plead it as a defense to a motion to revive the judgment.

Olson v. Nebraska Telephone Co.

We therefore recommend that the judgment of the district court be affirmed.

DUFFIE, EPPERSON and GOOD, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

PETER E. OLSON, APPELLANT, V. NEBRASKA TELEPHONE COMPANY ET AL., APPELLEES.*

FILED MARCH 20, 1909. No. 15,574.

1. **Master and Servant: CONTRACT: VALIDITY.** A contract by which a master seeks to impose upon his servant duties and obligations which the law imposes upon the master, and to relieve the master from liability for negligence on his part, is against public policy and void.
2. **Negligence: QUESTION FOR COURT.** Where the question of negligence is presented by the pleadings, and there is no conflict in the evidence, and but one reasonable inference can be drawn from the facts, the question is for the court. *Brady v. Chicago, St. P., M. & O. R. Co.*, 59 Neb. 233.
3. **Electricity: ELECTRIC LIGHT COMPANIES: NEGLIGENCE.** Where the ordinances of a city require an electric light company to maintain its electric light wires in a taut condition to avoid swinging contacts, and to keep such wires properly insulated, and, wherever it is necessary for such electric light wires to cross the line of a telegraph or telephone line, to string its said wires at a distance of not less than five feet from the wires of said telegraph or telephone line, a failure on the part of said electric light company to comply with all or any of such requirements is negligence which will render it liable to any person who, without fault on his part, is injured by reason thereof.
4. **Master and Servant: INJURY: QUESTIONS FOR JURY.** And in such a case, where the defenses of assumption of risk and contributory negligence are relied upon, it is error to withdraw the case from the jury, unless such defenses are established by evidence so clear that reasonable men would not be warranted in reaching a different conclusion.

* Rehearing denied. See opinion, 85 Neb. —.

APPEAL from the district court for Douglas county:
LEE S. ESTELLE, JUDGE. *Reversed.*

E. T. Farnsworth, for appellant.

Greene, Breckenridge & Matters, contra.

REESE, C. J.

This action was brought in the district court for Douglas county against the defendants Nebraska Telephone Company, which, for brevity, we shall designate the "Telephone Company," and the Omaha Electric Light & Power Company, which we shall designate the "Light Company," to recover for personal injuries which plaintiff claims to have received on or about June 28, 1906. The allegations of the petition substantially are that plaintiff was employed by defendant telephone company as a "ground man"; that his duties were to assist in stringing cables along the street for the purpose of suspending them to upper ends of the poles; that he was not acquainted with the danger attending the work of hanging the cable, and only consented to perform that work temporarily; that this work necessitated his working at a height of about 30 feet from the ground; that the telephone company negligently and carelessly provided him with a metallic car for the purpose of doing said work, well knowing that the same was not a safe and proper seat for performing said labor when said seat or car was likely to come in contact with the live wires of the light company where the same "intersect each other"; that defendant telephone company "negligently and wilfully required plaintiff to work upon said car, without it having any covering, insulation or protection whatever to prevent plaintiff while working on the same from coming in contact with any live wires which might be allowed to remain out of repair, and near said telephone wires"; that while performing said work he was proceeding north on Twenty-fourth street, and as he approached certain cross-wires of the light company,

and not knowing that they were in any way unsafe, and while seated upon the car furnished by the telephone company, and using all care and precaution on his part to avoid injury, he turned partially around in said car for the purpose of examining an apparent defect in one of the overhead hooks or fastenings which he had just passed, and while his attention was directed to said hooks an electric light wire, "which said defendants had carelessly, wilfully and negligently permitted to become and remain unprotected and out of place, and in contact with the wires of said telephone company, swayed and moved against said metallic car upon which plaintiff was seated, thereby conveying a heavy and dangerous current of electricity to said car and over said wires, and his hand came in contact with said wires, and thereby was formed what is termed and known as a short circuit between said wires and said metallic car and the body of this plaintiff, and he received thereby and therefrom an electric shock, which overcame and overpowered him to such an extent that he was rendered unconscious, and he lost his hold on said car and was thereby forcibly and violently thrown to the ground, breaking his left leg below the hip and receiving what is known as a compound fracture of said limb," and other serious injuries; "that the defendants carelessly and negligently failed, omitted and neglected to give plaintiff any notice or warning of the unprotected and unsafe condition of said electric light wire and to warn him of the fact that said wires crossed the telephone wire within a few inches therefrom and rendered same unsafe"; that he had no knowledge whatever that said wires were dangerous or in a dangerous condition, and had no knowledge whatever that there was any danger in working near the same; that defendants had ample notice of the dangerous condition of said wires; that plaintiff was free from any negligence, heedlessness or want of precaution on his part; that prior to the injury he was a robust, healthy man, of the age of 24 years, and that his earning capacity

was the sum of \$3 a day; that the injury he received had rendered him a cripple for life, for all of which he prayed damages. The separate answers of the defendants denied generally the allegations of plaintiff's petition, and pleaded assumption of risk and contributory negligence. The reply is a general denial.

There is really no conflict in the evidence as to any of the matters inquired of on the trial. It shows that at the time plaintiff received the injuries complained of the defendant telephone company was inclosing its wires along Twenty-Fourth street in a lead cable, about 1½ inches in diameter. This lead cable was suspended from a strong woven wire called "the messenger," and ran parallel with and about six inches below the messenger wire, being supported at short intervals by wire hooks, somewhat in the form of a figure 8, so that the cable would be permanently suspended from and supported by the messenger wire. It would appear that the linemen who had strung the cable had placed the wire hooks in position, but had not securely fastened them, and at the time of the injury it was plaintiff's work to pass along that wire and with a pair of metal plyers securely fasten the hooks. In order to do this he was seated on an iron saddle with an iron frame extending to the top of the messenger wire and attached to a wheel which ran upon the wire. The saddle was provided with a wooden seat. After fastening a hook he would pull himself along to the next and repeat the operation. The telephone wires ran north and south along the west side, and the electric wires of the light company along the east side, of Twenty-Fourth street. At the intersection of Twenty-Fourth and Grant streets one or more of the electric light wires crossed Twenty-Fourth street, some of the witnesses say diagonally, and passed under the telephone wires. Plaintiff was working northward. When he had reached, or nearly reached, the electric light wires, he turned partially around in his saddle to remedy some defect which he had discovered in the fastening which he had just passed, or

was just passing. While in the act of doing this, the witnesses say there was a flash, and plaintiff received an electric shock which caused him to fall from the saddle to the pavement below, a distance of about 30 feet. He was picked up in an unconscious condition and taken to a hospital. His injuries are clearly shown to have been very severe and of a permanent character.

Defendants introduced in evidence as exhibit 3 an accepted notice to linemen, an exact copy of which will be found set out in the opinion of Mr. Commissioner DUFFIE in *Ault v. Nebraska Telephone Co.*, 82 Neb. 434, and which, on account of its length, we will not repeat here. Defendants also introduced in evidence as exhibit 2 an application of plaintiff for employment by defendant telephone company. When plaintiff rested, the defendant telephone company moved the court to direct a verdict in its favor, basing said motion upon exhibits 2 and 3, above referred to, which motion the court sustained. This was error. The application, exhibit 2, corroborates plaintiff's contention that, when he was employed by the defendant telephone company, it was as a ground man. Exhibits 2 and 3 having been both signed by plaintiff on the same day, viz., February 20, 1905, it is evident that exhibit 3 was handed to plaintiff at the same time that he filed with the defendant telephone company exhibit 2. Conceding that exhibits 2 and 3 would be binding upon plaintiff, they could only be binding upon him in his employment as a ground man. Plaintiff might be willing to assume all responsibilities said to be placed upon him by exhibit 3, while working as a ground man, but be unwilling to assume such responsibilities while suspended in the air 30 feet above the pavement, and it may well be assumed that when he commenced the work of "riding the cables," about two weeks prior to June 28, 1906, all recollection of papers which he had signed on the 20th of February of the year previous, a year and four months, had passed from his mind. The evidence shows that, prior to commencing work for the defendant telephone

company in Omaha, he had worked for the same company in other parts of the state; the city of Seward being named as one of the places where he had so worked. It is very evident that the papers, exhibits 2 and 3, were signed by him at the time he began this outside work for the telephone company, where no such dangers as attended his employment on Twenty-Fourth street in the city of Omaha were present. Under such circumstances, the court was not warranted in deciding as a matter of law that exhibits 2 and 3 precluded a recovery by plaintiff.

But there is another reason why exhibit 3 should not have been held as a matter of law to constitute an absolute defense to plaintiff's action. As above shown, this same accepted notice, of this same defendant, was under consideration by this court in *Ault v. Nebraska Telephone Co.*, *supra*. In considering that document, this court, speaking through Mr. Commissioner DUFFIE, said: "Whether the master may impose upon his servant duties and obligations not in line of his employment, and relieve himself from liability for negligence in furnishing reasonably safe appliances for use by the servant, is not a question of grave doubt. That he cannot by a direct contract to that effect escape liability for negligence is well settled; such contracts being against public policy. The state has an interest in the lives and healthy vigor of its citizens, which it will not allow the master to endanger by contracting against liability for his negligently endangering them." The reasoning of the commissioner is well supported by his citations and many others. See 26 Cyc. 1094, and note 9. We have again considered the question, and are unanimously of the opinion that the rule is sound and salutary that any contract by which an employer seeks to impose upon his servant duties and obligations which the law imposes upon him, and to relieve himself from liability for negligence on his part, is against public policy and void.

After sustaining the motion of defendant telephone company to direct a verdict in its favor, the trial proceeded as against the defendant light company. A motion by the light company for a directed verdict was overruled and the case submitted to the jury, who returned a verdict in favor of defendant. Upon that branch of the case plaintiff contended that, exhibits 2 and 3 having been entered into between plaintiff and defendant telephone company, the defendant light company was not entitled to any benefit which might flow therefrom. This point was overruled by the court, and defendant was allowed in argument to the jury to discuss the two exhibits referred to. In this it seems to us that the trial court was inconsistent. If the defendant light company was entitled to the benefit of exhibits 2 and 3, it was entitled to such benefit to the same extent as the defendant telephone company. If it was not entitled to the benefit to the same extent as the telephone company, then it was not entitled to any benefit at all, and plaintiff's contention should have been sustained.

But, aside from this, there are other good reasons why the judgment in favor of the defendant light company cannot be sustained. There was introduced in evidence the "rules and requirements of the electrical department of the city of Omaha for the installation and operation of electric wires and apparatus." These rules appear in ordinances passed by the mayor and city council of the city, the regularity of which is not questioned. Rule 28 provides: "Wires must cross each other at right angles as near as possible, and, where it can be done, must cross on arms secured to poles or fixtures." * * * "Wires must be drawn taut to avoid swinging contacts, and in such cases the stretches must be short." Rule 30 provides: "Telegraph, telephone, and all other wires of like character must not be attached to the same arm with electric light and power wires, and, when possible, must run on a separate line of poles and fixtures. When running on the same poles wires must be kept at all points

five feet apart." Rule 33 provides: "All wires designed to carry an electric light or power current must be covered with a substantial, high-grade insulation not easily worn by friction, and whenever the insulation becomes impaired it must be renewed at once." Rule 46 provides: "That wires used as conductors for electric lighting purposes, and supports for the same, shall be erected or placed along the opposite side of any street or alley that is occupied by the wires of any fire alarm and police telegraph, telegraph or telephone company." Rule 47 provides: "Whenever it is necessary for an electric light conductor to approach or cross the line of any fire alarm and police telegraph, telegraph or telephone line, the same shall not approach or cross at a distance of less than five feet either above or below said fire alarm and police telegraph, telegraph or telephone wire, and shall be securely fastened on supports placed as near as practicable to said fire alarm and police telegraph, telegraph or telephone lines, or shall be carried in troughs or boxes across the route of said fire alarm and police telegraph, telegraph or telephone line, so constructed and placed as to prevent the electric light and police, telegraph or telephone lines coming in contact in case either should break or become detached from fixtures."

Thomas Olson, brother of plaintiff, testified that, when his brother was injured, he was telephoned to, and arrived at the point where the injury occurred some 15 or 20 minutes thereafter; that he made an examination of the wires while standing upon the pavement below, which would be a distance of about 28 to 30 feet from the wires; that the electric wires crossed about 12 inches below the telephone wires. As to the condition of the wire his testimony is as follows: "Q. What was the condition of the wire, if you know, at the place where it was near the telephone wire? A. The insulation, for one thing, was all worn off. The wire was bare where this car was standing up against the wire. I noticed that in particular. Q. Noticed the car near the wire? A. It was standing up

against the wire. The wire was touching this car at that time, and the wire was bare. Q. You may state the condition of that electric light wire, with reference to being tight or slack or otherwise. A. It was very slack. Q. State whether or not the wire that you speak of was inclosed in a trough. A. It was not."

The witness Yost testified that on the day of the accident he examined the place, and that his attention was called to the electric light wire. "Q. You may tell the jury the condition of that wire, as nearly as you can. A. The electric light wire, the insulation, the wrapping, was off of it badly along there, and it was—well, as near as I could judge from the ground, it was from, I should say, 12 to 18 inches from the telephone wire. Q. Did you notice the wire, as to whether it was tight or not? A. It was not tight."

The witness Leo Huntley, who was passing along the street just before plaintiff met with the injury, had stopped and was watching plaintiff and saw him fall. He testified: "I seen him fixing the wires there. Then he turned around to fix some of the others they had there, and there was a flash, and then he fell. Q. Did you notice this electric light wire particularly then, with reference to its being tight or slack? A. It was slack." On cross-examination we have the following: "Q. Was there anybody moving the electric wire there? A. It was moving around up there. It was swinging around up there—Q. Who was moving it? A. I do not know. I guess the wind was."

This testimony by these witnesses stands entirely uncontradicted. No attempt was made by the defendant light company to disprove the testimony that its wires at the point where they crossed the wires of the telephone company were only separated therefrom by a distance of from 12 to 18 inches, instead of 5 feet, as required by the ordinances of the city; that the insulation at that point was worn off and entirely gone from their wire, in violation of the requirements of the city ordinances, and that

Olson v. Nebraska Telephone Co.

their light wire was loose and swinging, instead of being taut, as required by the ordinances of the city. In the light of this uncontradicted testimony it was the duty of the court to charge the jury as a matter of law that the defendant light company was guilty of negligence in these particulars; but, instead of so doing, the court gave instruction number 5 as follows: "It is made the duty of the Omaha Electric Light & Power Company to cause all their wires which carry a current of electricity, to be covered with a substantial, high-grade insulation, not easily worn by friction, and, whenever the insulation becomes impaired, it must be renewed at once, and, if you find from a preponderance of the evidence that at the point mentioned in plaintiff's petition the wire of the defendant Omaha Electric Light & Power Company was not covered with a substantial, high-grade insulation, but that it had become worn and exposed, and that it came in contact with the chair or car on which the plaintiff was riding, then you should take all those circumstances into consideration in determining the question as to whether or not the defendant was guilty of negligence." The giving of this instruction was error. Plaintiff was entitled to have the jury told as a matter of law that all of the facts set out in instruction number 5 had been established by the uncontradicted evidence and that they established negligence on the part of the defendant light company. In *Union P. R. Co. v. McDonald*, 152 U. S. 262, which was an action for personal injuries, the trial court instructed the jury as a matter of law that the defendant was guilty of negligence and submitted to them the question of contributory negligence. A verdict and judgment in favor of the plaintiff for \$7,500 was sustained by the supreme court. The court by Harlan, J., say: "Upon the question of negligence, the case is within the rule that the court may withdraw a case from the jury altogether, and 'direct a verdict for the plaintiff or the defendant, as the one or the other may be proper, where the evidence is undisputed or is of such conclusive character that the

court, in the exercise of a sound judicial discretion, would be compelled to set aside a verdict returned in opposition to it.' " This is quoted and approved in *Southern P. Co. v. Pool*, 160 U. S. 438.

By instruction number 7, the court said: "Negligence is the failure to exercise such care, prudence and forethought as under the circumstances duty requires should be given or exercised. It may consist of the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do. Such negligence on the part of the plaintiff, which is the proximate cause of his injury, would defeat a recovery." Ordinarily this instruction might probably be sustained, but in the present case, considering the disposition which had been made of the case as to the defendant telephone company and the submission to the jury of the question of defendant's negligence by instruction numbered 5, we think the last sentence in instruction numbered 7 was calculated to mislead the jury. After defining negligence in the first part of the instruction, the court said: "Such negligence on the part of the plaintiff, *which is the proximate cause of his injury*, would defeat a recovery." We think the words italicized should have been omitted or the phraseology materially changed. If the word "if" had been substituted for the words "which is," it would to some extent have relieved the sentence from a possible construction by the jury that the court by the words used was saying to them that the plaintiff had been guilty of *such* negligence and that it "*is the proximate cause of his injury.*" We think there is considerable force in the contention made by plaintiff in his brief that "this instruction leaves nothing for the jury to consider, because it says in so many words that it was Olson's negligence that caused the injury."

Without setting out in full, we do not think that instruction numbered 4 should have been given in the language used. There was no question about plaintiff's right

to be where he was at the time of the injury. The defendant light company had a right to assume, in fact it knew, that the defendant telephone company would from time to time be sending men up its poles and stringing wires at the point where the lines crossed, and, for these reasons, we think that instruction numbered 4 was calculated to confuse, rather than aid, the jury in their deliberations.

Instruction number 9 is complained of by plaintiff, but the error in that instruction, if any, was without prejudice, as the jury never reached the question of the extent of plaintiff's injury.

The question as to whether or not plaintiff was himself guilty of negligence in the matter was, notwithstanding exhibits 2 and 3, clearly a question for the jury, and should have been submitted to them as to both defendants. Conceding that it was his duty to be on the lookout for any defects or dangers incident to his employment, it does not follow that he was required to be on the lookout for dangerous situations, the existence of which he had no reason to suspect, and which the ordinances of the city expressly forbade. Under the evidence before them, the jury would be justified in finding that plaintiff had no reason to suspect that he would come in contact with electric light wires at all, and would not have done so if the defendant light company had strung its wires at the intersection five feet above or below the wires of the telephone company; that the accident would not have occurred if the electric wires had been strung taut, as required by the ordinances; that, if they had been so strung, there would not have been the swinging motion testified to by the witnesses, which possibly caused the wire to come in contact with the iron seat upon which the plaintiff was riding; and that the accident would not have occurred if the wires had been properly insulated, as required by the city ordinances. All of these facts, together with the fact that plaintiff while riding on the car, after passing one of the hooks, partially turned in his seat to complete

Toliver v. Stephenson.

the fastening of the hook, or to do something else which his observation led him to believe ought to be done, and the fact that the saddle may have moved forward slightly while he was so turned in his seat, and the further fact that at that time the wind was blowing dust in his eyes, as he testifies, were questions for the jury to consider, under proper instructions, in determining whether or not plaintiff was himself guilty of negligence in failing to observe the uninsulated and slack condition of the electric light wire and its close proximity to the telephone wire or to the iron seat upon which he was riding.

For the errors above enumerated, the judgment of the district court is reversed as to both defendants and the cause remanded for further proceedings in harmony herewith.

REVERSED.

BARNES, J.

I dissent from so much of the opinion as reverses the judgment as to the Nebraska Telephone Company, and concur in the remainder of the opinion.

A. C. TOLIVER, APPELLEE, V. PRIOR L. STEPHENSON ET AL.,
APPELLANTS.

FILED MARCH 20, 1909. No. 15,537.

1. **Tax Sale: PURCHASE BY OWNER.** "A purchase of land at sheriff's sale in a suit foreclosing a tax lien made by one whose duty it was to pay the taxes operates as payment only. He can acquire no rights as against a third party by a neglect of the duty which he owed to such party." *Gibson v. Sexson*, 82 Neb. 475.
2. ———: ———. It is the duty of a mortgagor of mortgaged real estate while he holds the legal title thereto to pay the taxes levied thereon. That duty follows the title to the land to his grantee. Such grantee cannot while holding the fee title purchase the property at a foreclosure sale for taxes, and thereby

Tolliver v. Stephenson.

defeat the mortgage. The purchase would have only the effect of a payment of the taxes and redemption from the decree of foreclosure.

3. **Mortgage Foreclosure: DECREE.** In a proceeding to foreclose a mortgage securing a debt evidenced by a promissory note, no issue of payment or other diminution of the debt having been presented, the note and mortgage having been held valid and transferred to plaintiff for value, the plaintiff was entitled to a judgment for the full amount due upon the debt.

APPEAL from the district court for Brown county:
JAMES J. HARRINGTON, JUDGE. *Reversed with directions.*

L. K. Alder, for appellants.

P. D. McAndrew, *contra*.

REESE, C. J.

The petition is one for ordinary foreclosure of a real estate mortgage. The defendants Prior L. and Hannah M. Stephenson are the mortgagors. The mortgage and note bear date January 1, 1890, and were made to Edward H. Guyer. The amount named in the mortgage and note as the debt was \$230, due January 1, 1895, with interest at the rate of 7 per cent. per annum from the date thereof until maturity, and 10 per cent. thereafter. The mortgage was duly recorded on the 12th of January, 1890. The interest had been paid to July 1, 1894. It is alleged that plaintiff was the holder of the note and mortgage, and that the amount due at the time of the commencement of the suit was \$443. The defendant Frank A. Stephenson answered, alleging that during the years 1896, 1897, 1898 and 1899 the defendant Prior L. Stephenson was the owner in fee of the mortgaged property, and that the taxes for said years were not paid, and that all thereof were due and delinquent on February 1, 1901; that on that date the county of Brown instituted its action to foreclose the liens thereon created by said taxes; that Prior L. Stephenson, the then holder of the legal title, was made a party, as well as Guyer, the then holder of the mortgage; that

on the 23d day of April, 1901, a decree foreclosing the tax lien was entered, finding due the sum of \$45.50 and costs of suit; that on the 23d day of September of that year a sale was made by the sheriff to the answering defendant, which sale was confirmed on the 7th day of the following October, and on the 10th of said month the sheriff made and delivered to him a deed to the property, under which he took possession, making valuable and lasting improvements thereon to the extent of \$310; and that during the whole of said time the said Edward H. Guyer was the owner and holder of the note and mortgage declared upon, as shown by the records of the county, no assignment having been recorded, and defendant purchased said land in good faith without notice of any transfer of said note, if any had been made. The answer also pleaded the statute of limitations. The reply admitted the ownership of the land by Prior L. Stephenson at the time the taxes were assessed and levied, and that the foreclosure proceedings were had, but denied the other averments of the answer. It is further alleged that at the time of the foreclosure of the tax liens the said Prior L. Stephenson was not the owner of the real estate in question; that during said time, and at the time of the purchase by defendant Frank A. Stephenson at the sheriff's sale, the said defendant was the owner in fee of said premises, having purchased the same from said Prior L. Stephenson and received a deed therefor on the 30th day of January, 1901; that he was not made a party to said foreclosure proceedings, and that Edward H. Guyer, who was made a party, had before that time sold and transferred the note and mortgage to one Marion E. Sweeney, through whom plaintiff derived his title, and who had no interest in the note or mortgage; and that defendant Frank A. Stephenson withheld his deed from record until October 23, 1901, after he had made his pretended purchase, and that said pretended purchase was fraudulent and void. A trial was had, which resulted in a finding and decree in favor of plaintiff for the sum of \$337.34, and the usual decree of

foreclosure. From this decree defendant Frank A. Stephenson appeals. Plaintiff presents a cross-appeal, alleging that the court erred in the amount found due upon the note, and that the decree should have been for \$566.44 claimed as the true amount of principal and interest.

1. From an examination of the bill of exceptions it is clear that, at the time the land was bid in at the sheriff's sale under the decree of foreclosure for the delinquent taxes, the defendant Frank A. Stephenson, the purchaser, was the owner of the fee title to said land, and under the rule in *Pitman v. Boner*, 81 Neb. 736, and *Gibson v. Serson*, 82 Neb. 475, he could take nothing by his purchase as against other subsisting liens and interests. The payment of the amount of the bid, which it is shown was more than the taxes and costs, was simply a payment of the taxes due upon the land of which he was the owner, and therefore he gained nothing by the purchase except that he paid the taxes which it was his duty to pay. But it is claimed that the foreclosure proceedings to which Guyer was made a party, and who then owned the mortgage, cut off the rights of the mortgagee, and he and his assigns are now estopped thereby. It must be conceded that the purchase at sheriff's sale by the holder of the legal title was nothing more or less than a redemption. As the payment was made within the time in which the redemption could be made under the provisions of section 497 of the code, the payment or redemption has the effect of satisfying the decree, and the suit is at an end.

2. It is alleged in the petition that no part of the debt secured by the mortgage had been paid, except the interest to July 1, 1894. The note is for \$230. The specified rate of interest is 7 per cent. per annum until maturity, and 10 per cent. thereafter. There is no plea of payment in the answer. The interest on the note from July 1, 1894, to January 1, 1895, the time of the maturity of the note, was \$8.05. The interest from January 1, 1895, to the 6th day of January, 1908, the date of the entry of the decree (13 years and 6 days), was \$299.40, the total interest

Jarmin v. Swanson.

being \$307.45, which, added to the principal, would make \$537.45. The sum found due by the decree, being \$337.34, was \$200.11 less than the amount actually due. We find nothing in the record explaining any reason for this error, and conclude that it is either clerical or that there was a mistake in the computation. In either case the correction should be made.

The appeal of the defendant is dismissed, and the cross-appeal of plaintiff sustained. The judgment of the district court is reversed and the cause remanded to that court, with directions to enter a decree of foreclosure for the full amount due upon the debt.

REVERSED.

JOHANNA M. JARMINE ET AL., APPELLEES, v. CHARLES A. SWANSON ET AL., APPELLEES; LOUISE MOLLIN, APPELLANT.

FILED MARCH 20, 1909. No. 15,621.

Judgment: VALIDITY. J., a married man and the head of a family, died seized of certain real estate occupied by himself and family as their homestead. In the administration of his estate, the land was set off to the widow by the county court as her homestead, giving her the title "in fee simple." She afterwards sold the property, conveying it by warranty deed. Through mesne conveyances S. became possessed of the title held by the widow, and executed a mortgage thereon for value to M. The widow died, and the children of herself and J. brought an action to remove the clouds upon their title created by the deed to S. and his mortgage to M. M. defaulted. S. answered, contesting the suit of plaintiffs, but the question of the indebtedness of S. to M. was not put in issue in any form. The final decree was in favor of the heirs, and, after the provision that the mortgage did not constitute a lien on plaintiffs' land, it was further declared that it did not constitute "a personal liability on the part of the defendants." Defendant M. appeals. *Held*, That the provision in the decree which sought to destroy the liability of S. to M. was void.

APPEAL from the district court for Boone county:
JAMES R. HANNA, JUDGE. *Reversed with directions.*

Jarmin v. Swanson.

James G. Reeder and Louis Lightner, for appellant.

William V. Allen and H. Halderson, contra.

REESE, C. J.

This is an appeal from a decree rendered by the district court for Boone county. The heirs of Christian Johnson, deceased, instituted the suit against Charles A. Swanson and Louise Mollin, alleging that the said Christian Johnson died seized of the northwest quarter of the southeast quarter of section 10, township 22, range 5, in Boone county; that he left surviving him Anna Johnson, his widow, and the plaintiffs, their children, as his sole heirs at law; that in the administration of the estate, upon the application of the widow, the land was set off to her as her homestead, giving her the title in fee simple, which the court had no power or jurisdiction to do, and the said order was void; that the defendant Charles A. Swanson through several mesne conveyances derives his title from the said Anna Johnson, now deceased; that Swanson had executed a mortgage to the defendant Mollin to secure the sum of \$600; and that Johnson's deed and the Mollin mortgage are clouds upon the title which plaintiffs have inherited from their father, Christian Johnson. The prayer is for a cancelation of Swanson's deed and the Mollin mortgage and the removal of the cloud upon their title created thereby. Mollin failed to answer and default was entered against her. Swanson answered and a trial was had, the finding and decree being in favor of plaintiffs. Mollin only has appealed. There is no bill of exceptions.

In the decree of the court the following language occurs: "It is ordered, adjudged and decreed by the court that the alleged mortgage lien of the defendant Louise Mollin on the land in suit, be and the same is hereby, adjudged to be null and void, and not to constitute a lien upon the said premises *or a personal liability on the part*

of the defendants *Charles A. Swanson and Lena Swanson.*" There was nothing in the pleadings anywhere placing the liability of Swanson to Mollin in issue, and therefore any order affecting their rights as between themselves must necessarily be void. As there was nothing in the petition submitting any such issue or seeking any such order, the defendant had the right to assume that the decree would be within the issues, and that her demand against the Swansons personally would remain unaffected without reference to the validity of the lien sought to have been created by the mortgage. It requires no argument nor citation of authorities in support of the proposition that the court had no jurisdiction, power or authority to make any such order, and that it was void. As Swanson and Mollin were not adversely interested, no order could be made, as between them, which would bind them in a subsequent action brought by Mollin for the collection of the debt secured by the mortgage. *Wiltrout v. Showers*, 82 Neb. 777. By a perusal of the whole decree it is quite clear that the language referred to was inadvertently used, and was probably not detected by the court, as later on in the body of the entry the same order is entered in substance, but without the use of the objectionable language.

It is insisted by the appellees Jarmin and Swanson that appellant has mistaken her remedy; that, if the decree was void or erroneous, the mistake, if such it was, should have been called to the attention of the trial court and a correction requested, and that, in the absence of such proceeding, no appeal can be had. It is also urged that, "if the judgment covered matter not embraced in the issue, it is to that extent void; that there can be no appeal from a void judgment." Many cases are cited supporting the contentions of appellees, but it is believed that many of them are not in point. It is true, however, that the decree might have been corrected upon a timely motion seeking that remedy. Whether that proceeding is

Jarmin v. Swanson.

exclusive is not so clear. We may assume for the purposes of this case that, if a defendant makes default and a judgment or decree is rendered against him in accordance with the averments of the petition, he should apply to the court rendering the judgment to set aside the default and judgment and permit him to answer, but that is not this case. Appellant was entirely willing that plaintiff should have all the relief asked. Had the course suggested been pursued, there was nothing that could be presented by way of answer or traverse which would afford relief. The only thing that could have been done would have been to correct the void part of the decree. It is not an appeal from a legal judgment, but from one that is void in part. The right of appeal is secured by the constitution of this state (art. I, sec. 24) and by the statutes. This right is fully recognized by the former decisions of this court, and full force given to the constitutional provision in *Curran v. Wilcox*, 10 Neb. 449, *Holland v. Chicago, B. & Q. R. Co.*, 52 Neb. 100, and *Zweibel v. Caldwell*, 72 Neb. 47, 53, none of which, however, are similar to this case. In *Northern Trust Co. v. Albert Lea College*, 68 Minn. 112, it was held by a majority of the court that the power of the court to grant relief in a judgment by default is limited to that demanded in the complaint, and, where such judgment was not justified by the pleadings and prayer for relief, the error could be reviewed and corrected by an appeal from the judgment.

That the entry referred to is erroneous and void is apparent. It is of no force, a mere nullity, and may be attacked by direct proceedings as well as collaterally, should the question of its validity ever arise. See *Banking House of A. Castetter v. Dukes*, 70 Neb. 648; *Woodward v. Whitescarver*, 6 Ia. 1; *Doolittle v. Shelton*, 1 Greene (Ia.) 271; *White v. Iltis*, 24 Minn. 43; *Cooper v. American Central Ins. Co.*, 3 Colo. 318.

The judgment of the district court, in so far as it assumes to adjudicate the rights of the defendants Swanson and Mollin as between themselves, is reversed and the

cause remanded to correct the same by eliminating that part of the decree.

REVERSED.

CITIZENS BANK, APPELLEE, v. HENRY E. FREDRICKSON,
APPELLANT.

FILED MARCH 20, 1909. No. 15,408.

1. **Notes for Accommodation.** F. at the request of the B.-H. Mfg. Co. executed and delivered to it his two promissory notes of \$1,000 each to be used by the company in raising money to relieve it from a condition of financial embarrassment. The company at the same time left three automobiles in the possession of F. to protect him from loss, and with the understanding that he could sell the machines and apply the proceeds to the payment of his notes. It was also agreed that the notes might be renewed from time to time, if necessary, and if the machines were redelivered to the company it would return the notes to F. *Held*, That the notes were accommodation paper.
2. ———: **DEFENSES.** It is no defense to an action on an accommodation note by the indorsee against the maker that it was made without any consideration, or that it was understood between the maker and the payee that the latter was to take care of it; and this, although the holder had, when he took the note, full notice of the circumstances under which it was made.

APPEAL from the district court for Douglas county:
GEORGE A. DAY, JUDGE. *Affirmed*.

Lysle I. Abbott, for appellant.

McGilton & Gaines, contra.

BARNES, J.

This suit was based on a promissory note executed and delivered by the defendant to the Beardsley-Hubbs Manufacturing Company, dated the 19th day of November, 1902, and by it indorsed to the plaintiff before maturity. It was admitted by the defendant that the plaintiff was the purchaser of the note before due, for value, and in the due

Citizens Bank v. Fredrickson.

course of business; but it was claimed in the answer and on the trial that plaintiff's ownership was with notice of the equities between the defendant and the original payee of the note. The case was tried before Honorable W. A. Redick, one of the judges of the district court for Douglas county, and a jury, and a verdict was rendered for the defendant. Plaintiff filed a motion for a new trial, which was sustained, the verdict was set aside, and the cause was again set down for trial. There was a second trial before the Honorable George A. Day, another judge of said county and district, and at the close of all of the evidence the court directed the jury to return a verdict for the plaintiff. This was done, judgment was duly rendered on the verdict, and the defendant has appealed to this court.

It appears without controversy that on July 18, 1902 one Volney S. Beardsley, an officer of the Beardsley-Hubbs Manufacturing Company, came to the city of Omaha for the purpose of attempting to dispose of some automobiles which his company had shipped to the defendant, and who, for some reason, had refused to purchase them, and then and there entered into an agreement with the defendant as follows: "Omaha, Nebraska, July 18, 1902. Received from H. E. Fredrickson two notes, one for \$1,000 due in sixty (60) days from date, one for \$1,000 due in four months from date without interest, which paper is given as accommodation paper to be used by us while we leave the following automobiles in your hands on consignment for sale: One number one Stanhope with top. Two number three combination Stanhopes. As soon as any of the above machines are sold, H. E. Fredrickson is to remit us for same and the proceeds indorsed on this accommodation paper. In event the paper becomes due before the machines are sold we agree to renew the paper without interest until the machines are sold or, should we reship the machines, before doing so will return these two notes canceled. We agree to make you a flat price on these machines of \$750 each, which price has nothing to do

with any future business, and will do all in our power to assist you in closing any business on the sale of our machines by referring inquiries to you. The machines are to be kept clean and stored by you, and are not to be run out unless to show to a prospective buyer. Yours very resp., The Beardsley-Hubbs Mfg. Co., Volney S. Beardsley, Treas. & Mgr''; that in pursuance of said agreement the defendant executed two notes of \$1,000 each to the Beardsley-Hubbs Manufacturing Company, and delivered them to Beardsley, who thereupon left the cars described in the foregoing agreement with the defendant on consignment; that Beardsley took the two notes to Shelby, Ohio, where his company was located, and they were thereupon used for the purpose for which they were executed, by selling and delivering them to the plaintiff; that thereafter such transactions and arrangements were had that one of the notes was taken up and returned to the defendant and the other one was renewed; that there was paid upon the renewal note, which is the one in suit, \$600, leaving a balance of \$400 due thereon, which, together with interest, was sought to be recovered in this action. It further appears that the Beardsley-Hubbs Manufacturing Company was in financial difficulty at the time the notes were executed, and Beardsley informed the defendant of that fact. It also clearly appears that the original notes were given as accommodation paper in order to enable the payee to raise money thereon and thus relieve itself from that condition; that after the note in suit was executed, and about the 1st of December, 1902, the Beardsley-Hubbs Manufacturing Company failed in business, and was succeeded by the Shelby Motor Car Company, which last-named company took over the assets and assumed the debts and obligations of its predecessor; that some time thereafter, and while the note in suit was in the hands of the plaintiff bank, defendant returned the cars mentioned in the agreement, and which were still in his possession when the note in suit was executed, to the Shelby manufacturing company; that the company

acknowledged the receipt of the cars and promised to return the note, but never did so, for the reason that it failed in business, became a bankrupt, went into the hands of a receiver, and was unable to comply with its agreements.

The defense interposed was that the note in suit was without consideration; that, when the plaintiff discounted it, it did so with full knowledge of the terms of the contract between the Beardsley-Hubbs Manufacturing company and the defendant; that the Shelby Motor Car company, the successor of the payee of the note, failed, refused and neglected to comply with the terms of the contract, and therefore the defendant was fully and completely discharged from any and all liability upon the note.

The defendant contends that he was induced to execute the note in suit by reason of having in his possession for display the three machines described in the contract above quoted, with the privilege of selling them at a profit; that an accommodation note is one without consideration as between the maker and the accommodated party; that therefore the note in suit was not accommodation paper, and no right of action can be predicated thereon by the bank as against him. In *Greenway v. Orthwein Grain Co.*, 85 Fed. 536, we find a most excellent description of what constitutes accommodation paper, which we quote as follows: "Accommodation paper constitutes a loan of credit, without consideration, by one party to another, who undertakes to pay the paper and indemnify the lender against loss on its account. It is paper which is made, indorsed, or accepted by one party, without consideration, for the accommodation of another, for the purpose and with the intention that the latter shall obtain money or credit upon it of some third party. The accommodated party can maintain no action upon it against the accommodation maker, because the latter has received no consideration for it from him. But, if the party accommodated uses the paper in the ordinary course of business to obtain money, credit, or any other thing of value from a third party, the

law imputes the consideration which he receives to the accommodation maker, indorser, or acceptor, because the latter, by placing his name upon the paper, has, in effect, requested him who advances the consideration upon it to pay that consideration to the party accommodated. It was for that very purpose and with that intention that he placed his name upon the paper; and when a stranger has given a valuable consideration for it to the accommodated party in reliance upon this purpose and intent, the accommodation maker cannot be permitted to say that he has not himself received that consideration. It is therefore no defense against one who has acquired accommodation paper, with knowledge of its character, but in good faith, in the ordinary course of business, and for value, that the accommodation maker actually received no consideration for it." The note in question is described in the contract and in the pleadings as accommodation paper, and the defendant's counsel states: "The giving of these notes was beyond question a great accommodation to the Beardsley-Hubbs Manufacturing Company." Again, the machines which were left with Fredrickson on consignment bore no relation to the notes, but were held by him as security for the performance of the Beardsley agreement. In *Miller v. Larned*, 103 Ill. 562, it was said: "Accommodation paper is either a negotiable or non-negotiable bill or note made by one who puts his name thereto without consideration, with the intention of lending his credit to the party accommodated." So we are of opinion that the district court was right in holding that the note in question was accommodation paper.

If this be true, it follows that the fact that the note was without consideration as between the defendant and the Beardsley-Hubbs Manufacturing Company is no defense to the plaintiff's action. Such was the view entertained by the supreme court of Minnesota in *Rea v. McDonald*, 68 Minn. 187, where it was held that an accommodation maker or indorser of a bill or note cannot make the defense of a want of consideration as against a

Citizens Bank v. Fredrickson.

person who, in the regular course of business, and for value, has taken it before maturity, although the latter knew when he received the instrument that it was accommodation paper. In *Thatcher v. West River Nat. Bank*, 19 Mich. 196, it was said: "It is no defense to an action on a promissory note by an indorsee against the maker, that it was made without any consideration to the maker, or that it was understood between him and the payee that the latter was to take care of it; and this, although the holder had, when he took the note, full notice of the circumstances under which it was made." In *Miller v. Larned*, *supra*, it was held that, as to the holder of an accommodation note into whose hands it has come in the usual course of business for a valuable consideration, the maker will have no defense, and it makes no difference that the holder may have taken the note with full knowledge that it was accommodation paper. The case of *Rea v. McDonald*, *supra*, was one where the accommodation makers, under an agreement with the accommodation payee, took security to protect themselves from loss. To that extent that case and the one at bar are practically the same, and it was there said: "The proof is clear that defendants expected Blethen would discount the paper for his own benefit, and, having this expectation, they attempted to protect themselves from loss by taking security from him. At the request of Blethen, and that he might receive its benefits, the defendants loaned their credit in the shape of a promissory note, in which the bank of New England was named as a payee. He used this note at the bank, either by discounting the same and causing the amount thereof to be placed to his credit on deposit account, or by using it to pay a pre-existing debt. In either case, and with or without knowledge that it was accommodation paper, the bank received it in good faith, and a good consideration passed between the latter and the defendants."

From the foregoing authorities it seems clear that, unless the defendant has shown the existence of such an

intimate relationship between the plaintiff in this case and the Beardsley-Hubbs Manufacturing Company as to in fact and as a matter of law constitute the plaintiff an original payee of the note in question, it is impossible for him to escape liability thereon. Upon this point the record contains some evidence that at least a part of the stockholders of the bank were also stockholders of the Beardsley-Hubbs Manufacturing Company. It appears that this evidence was introduced for the purpose of establishing the fact that the plaintiff had notice of all of the conditions of the agreement between the defendant and the payee of the note, and of the equities existing in favor of the defendant by reason of the transactions which occurred between them. It is doubtful if the evidence is sufficient to establish notice, much less any such intimate relationship between the bank and the manufacturing company as would put the plaintiff in the position of a payee of the note. If we were to consider the equities of this case, it seems clear that they preponderate in favor of the plaintiff. It parted with its money on the faith and credit of the note in question, and, unless the defendant is held liable, the balance due thereon will be wholly lost to the plaintiff. Again, the defendant was fully protected by his possession of the cars described in the contract with the payee of the note, and the fact that he voluntarily parted with his security is not the plaintiff's fault.

We are therefore of opinion that the defendant failed to establish any defense, either by his pleadings or his evidence to the plaintiff's cause of action. It follows that the verdict rendered on the first trial was properly set aside; that the directed verdict in the second trial was the only one which could have been rendered in this case; and, for the foregoing reasons, the judgment of the district court is

AFFIRMED.

THOMAS L. SLOAN, APPELLEE, v. ALFRED HALLOWELL,
APPELLANT.

FILED MARCH 20, 1909. No. 15,587.

1. **Judgment by Default: SETTING ASIDE.** When a judgment on default has been entered against a defendant, which he seeks to have vacated, good practice requires him to exhibit to the court such matters in excuse of his default as he is able, and, in addition thereto, that he has a meritorious defense, either in whole or in part, to the action.
2. ———: ———. Where the ground of defendant's motion is that the petition on which the judgment was rendered is not sufficient to state a cause of action, the pleading will be liberally construed, and if, when so considered, it is found sufficient to sustain a judgment by default, the motion should be overruled.

APPEAL from the district court for Thurston county:
GUY T. GRAVES, JUDGE. *Affirmed.*

Hiram Chase and J. A. Singhaus, for appellant.

Thomas L. Sloan and Curtis L. Day, contra.

BAERNES, J.

This action was brought in the county court of Thurston county, where the plaintiff, after a trial on the merits, had judgment. The defendant prosecuted an appeal to the district court. The plaintiff, who is an attorney at law duly admitted to practice in all the courts of this state, sought to recover the amount of a retainer fee alleged to be due him from the defendant. In due time he filed his petition in the district court, and the defendant attacked the same by motion, requesting the court to strike paragraph 2 therefrom. His motion was sustained, and time was given him to answer the petition as it then stood. Later on, at a regular session of the district court, the defendant having failed to file his answer, a judgment was rendered against him by default. Upon this point the transcript contains the usual recital that the defendant was in default of answer; that he was duly called in open

Sloan v. Hallowell.

court, and came not, but made default; that plaintiff thereupon produced his evidence; that the court upon such evidence found the facts in his favor, and duly rendered its judgment thereon. Some time afterwards the defendant filed a motion to set aside the judgment and default, and to be let in to defend. He tendered no answer as to the merits, and there is nothing in the record which shows or tends to show that he had any meritorious defense to the plaintiffs' cause of action. In place of such an answer, he tendered a general demurrer, and thereupon the district court overruled his motion. From that ruling defendant has brought the case here by appeal.

His first contention is that the petition does not state facts sufficient to constitute a cause of action, and therefore the judgment should have been set aside. Defendant's argument proceeds on the theory that the action is one upon account. If this were true, there would be some merit in his contention. We find, however, that the action is one by an attorney at law against a client to recover a retainer fee. Without setting forth the petition, it is sufficient to say that the pleading is not one to be commended, yet in our opinion it is sufficient to sustain a judgment by default. It alleges the employment of the plaintiff by the defendant to represent him in a criminal action which was about to be commenced against him. It states the amount charged defendant as a retainer. It contains a statement of the services actually rendered in behalf of the defendant under such employment and alleges that the plaintiff rendered a statement of account to the defendant therefor; that such statement stands undenied, and also unpaid, and concludes with the usual prayer for judgment. It seems to be somewhat deficient in failing to allege that the plaintiff is an attorney at law, but we think this allegation, while entirely proper, was really unnecessary because the district court, as well as this court, will take judicial notice of the fact that the plaintiff is an attorney and counselor at law, and a practitioner in good standing in all the courts of this state.

Shepherdson v. Clopine.

Section 136 of the code provides: "Neither presumptions of law, nor matters of which judicial notice is taken, need be stated in the pleading." See, also, 1 Elliott, Evidence, sec. 56, note 118. We are therefore of opinion that the petition is sufficient to support a judgment against the defendant.

We come now to consider defendant's motion to set aside the judgment, and to be let in to defend. As above stated, no plea to the merits accompanied his motion. By section 606 of the code it is provided: "A judgment shall not be vacated on motion or petition, until it is adjudged that there is a valid defense to the action in which the judgment is rendered, or, if the plaintiff seeks its vacation, that there is a valid cause of action." In *Bond v. Wycoff*, 42 Neb. 214, it was held that, where a judgment on default has been entered against a defendant which he seeks by motion to have vacated, the motion must be accompanied by an answer showing a meritorious defense, either in whole or in part, to the action, and that, if no defense is alleged, it is not error to overrule the motion to vacate the judgment. The same rule was announced in *Mulhollan v. Scoggin*, 8 Neb. 202, *Fritz v. Grosnicklaus*, 20 Neb. 413, *Dixon County v. Gantt*, 30 Neb. 885, and in many other cases.

It follows that the district court did not err in overruling the defendant's motion, and its judgment is therefore

AFFIRMED.

ISAAC SHEPHERDSON, APPELLANT, v. GEORGE W. CLOPINE ET AL., APPELLEES.

FILED MARCH 20, 1909. No. 15,623.

1. **Appeal: MISCONDUCT OF PARTIES: REVIEW.** During the progress of the trial, defendants requested the court to order the jury to view the *locus in quo*, and offered to pay the expense thereof. The order was not made at that time, but on the day following the court stated that if the offer was still open he would make

Shepherdson v. Clopine.

the order. Defendants replied that the offer was still good, and thereupon the order was made. The jury, in charge of a balliff, drove to the premises in question, and at noon ate dinner at the home of one of the defendants, thus partaking of his bounty without charge or payment therefor. The trial was concluded on the following day and resulted in a verdict for the defendants. Plaintiff failed to interpose an objection or reserve an exception to the order, and, being aware of the fact that the jury ate dinner at the home of one of the defendants without his presence or the presence of his counsel, failed to call that matter to the attention of the court and arrest the progress of the trial. *Held*, That he could not, after verdict, complain of the order or avail himself of the misconduct of the defendants in providing dinner for the jury.

2. **New Trial: MISCONDUCT OF JURY: OBJECTIONS.** A new trial should not be granted for the misconduct of the jury where it affirmatively appears that such misconduct was known to the complaining party in time to have enabled him to call it to the attention of the court before the jury retired to consider their verdict.

APPEAL from the district court for Franklin county:
ED L. ADAMS, JUDGE. *Affirmed.*

A. H. Byrum and Morlan, Ritchie & Wolff, for appellant.

J. P. A. Black, Owsley Wilson and Dorsey & McGrew,
contra.

BARNES, J.

This was an action brought in the district court for Franklin county to recover damages alleged to have accrued to the plaintiff by the overflowing of his land, for which he claims the defendants were responsible. There was a verdict for the defendants and judgment thereon, and the plaintiff has appealed to this court.

But one assignment of error is presented for our consideration, and so the determination of this case rests upon the single question, which is: Should the plaintiff be granted a new trial for the misconduct of the defendants hereinafter set forth?

It appears that during the progress of the trial the defendants requested the court to order the jury to view the

Shepherdson v. Clopine.

locus in quo, and offered to pay the cost of such examination if the court would make the order. The order was not made at the time, but on the following day, and while the trial was still in progress, the court stated that if the offer was still open he would make the order for the jury to view the premises. Defendants stated that the offer was still good, and thereupon the order was made. The following day the jury, in charge of a bailiff, and accompanied by counsel on both sides, drove to the premises in question. At or about noon counsel for the defendants made inquiry about dinner and thereupon one of the defendants informed him that he had prepared dinner for the jury at his house. One of the jurors asked about dinner, and was informed that, "Dinner is on the table right now." Thereupon the jury, accompanied by the bailiff, ate dinner at the home of one of the defendants, thus partaking of his bounty without charge or payment therefor. The trial was concluded on the following day without objection by the plaintiff, and the jury returned a verdict for the defendants. It also appears that the attorney for the plaintiff, who was designated by the court to accompany the jury, was not invited to dinner by the defendants, but was compelled to go elsewhere for his meal, while the attorney for the defendants ate his dinner with the jury. So it appears that the jury spent the dinner hour at the home of one of the defendants and partook of his bounty without the presence of counsel for the plaintiff, and this alleged misconduct is assigned as error.

It is contended on the part of the defendants that the plaintiff was aware of what occurred at the time; that plaintiff's attorney was present when the jury were invited to partake of the meal, and knew of their acceptance of the invitation; that, having failed to interpose an objection and arrest the trial, the plaintiff cannot now avail himself of such misconduct. In considering this question we find that it is almost universally held that a new trial will not be awarded to the losing party for misconduct of the jury, where it is known to him, and he fails to call it to the

attention of the court immediately, but waits to speculate upon the verdict. We further find that for misconduct of the prevailing party the rule is somewhat different, and the authorities upon this question are divided. We are of opinion, however, that, when the order complained of was made, it was the duty of the defendants to direct the attention of the court to the danger of such a proceeding. Without doubt a mere suggestion at that time would have been sufficient to prevent the making of the order in that objectionable form, and the court would have provided by the order that the expenses attendant thereon should follow the judgment. We are therefore of opinion that the plaintiff by failing to interpose an objection to the order, and by reserving no exception thereto, cannot now question its validity.

It is suggested in the plaintiff's brief, and it was urged by counsel upon the oral argument, that he could not safely object to the order of the court because such an objection would tend to prejudice the jury against his client, and for the same reason he did not deem it prudent or proper to raise the objection at any time before the submission of the case and that the first time he could safely avail himself of such an objection was on his motion for a new trial. We are all agreed that this is not a sufficient excuse, that by failing to object to the order he tacitly, if not openly, agreed to it, and, if he failed at that time to avail himself of his right to an exception, it was a misfortune for which we can afford him no relief. A somewhat similar question was before the supreme court of Iowa in the case of *Hahn v. Miller*, 60 Ia. 96. In that case it appears that the defendant rode in a sleigh with the jury when they were taken to view the *locus in quo*. No objection was made at the time by the plaintiff, when he could have prevented the act, and it was held that such misconduct could not be urged on a motion for a new trial as a ground for disturbing the verdict.

As to the matter of the misconduct of the jury in going to the home of one of the defendants for dinner: It

Stanisics v. Hartford Fire Ins. Co.

appears that the trial proceeded for at least one day thereafter, and yet plaintiff failed to call that matter to the attention of the court, as he might have done, but again concluded to await the result of the trial, and to thus a second time speculate upon the verdict. It therefore seems clear that by his own conduct he has waived his right to complain of that transaction. We are all of opinion, however, that the making of the order complained of should be condemned, and yet, the plaintiff having failed to make timely objection to any of the proceedings of which he now complains, we cannot relieve him from the consequences of such failure.

For the foregoing reasons, the judgment of the district court is

AFFIRMED.

**THEODORE STANISICS, APPELLANT, V. HARTFORD FIRE
INSURANCE COMPANY, APPELLEE.**

FILED MARCH 20, 1909. No. 15,550.

1. **Insurance Contract: ENFORCEMENT.** A contract of insurance is a contract of indemnity, and any person attempting to enforce a claim under such a contract must show an interest in the subject matter of the contract.
2. **Appeal: FINDINGS BY COURT.** The findings of the district court in a law action tried to the court without the intervention of a jury are entitled to the same weight as the verdict of a jury, and will not be disturbed unless the evidence is clearly insufficient to support them.

APPEAL from the district court for Lancaster county:
EDWARD P. HOLMES, JUDGE. *Affirmed.*

Samuel J. Tuttle, for appellant.

R. W. Barger and Hall, Woods & Pound, contra.

LETTON, J.

This was an action to recover upon a policy of fire insurance issued to one Parks. The policy had attached a

mortgage clause by which the loss was made payable "to Rena L. Salisbury or assigns, mortgagee or trustee or successor in trust as hereinafter provided." The plaintiff claims to be the owner of the mortgage by assignment from Rena L. Salisbury, and bases his right of recovery upon the mortgage clause.

The evidence discloses a very peculiar state of facts. The building which was insured was a dwelling situated upon a ten-acre tract of land near Lincoln. In 1903 the land belonged to certain nonresidents for whom the plaintiff Stanisics was apparently acting as agent. He purported to sell it and procured a deed of conveyance to be made to one Fred Williams, who had no interest in the matter, and who received the title for Stanisics' benefit. He then caused Williams to transfer the property to one Estella McMasters, who was then a minor, and then procured her to execute certain notes and a mortgage on the property for the sum of \$1,800 payable to one Rena L. Salisbury. Miss McMasters had no interest whatever in the property, and merely acted in the matter to accommodate Stanisics. He had originally applied to Williams to allow him to have the notes and mortgage made payable to him, but Williams refused to permit this to be done, and suggested that Mrs. Salisbury, who was then visiting at Williams' home and who was a nonresident of this state, might be willing to do it. Upon this suggestion, with her consent, the name of Mrs. Salisbury was inserted in the notes and mortgage without consideration, and she indorsed and assigned them in blank without recourse on her. The papers were then delivered to Stanisics. No one but the plaintiff up to this time had any interest in the property. In fact, this is expressly admitted in the plaintiff's reply. Soon afterwards the plaintiff procured Estella McMasters to convey the property to Clarence G. Parks without any consideration to her. The only disputed facts in the case arise from this transaction, the defense claiming that Parks had no insurable interest in the property, but that he merely took

the naked legal title for the benefit of Stanisics who continued to be the real owner, while the plaintiff contends that Parks was an actual *bona fide* purchaser, and that the \$1,800 mortgage given to Mrs. Salisbury and assigned by her was given in order to effectuate the sale to Parks and with his full knowledge and consent, he having previously informed plaintiff that he could not be sure that his wife would sign a mortgage, and, plaintiff not desiring to sell under a contract for future payments, the mortgage was made to carry out the terms of sale.

At the time these transactions were had, it would seem that there was an insurance policy of \$600 upon the property, but a few weeks later a new policy was issued for \$1,000 containing the mortgage clause upon which this suit is based. The house burned in August. Estella McMasters is the daughter of one Mrs. Blake, who kept a rooming house, where Parks, who is a piano salesman roomed while in Lincoln. Parks and Mrs. Blake both swear that Stanisics was present at her home with a notary at the time the deed was made from her daughter to Parks, and that Parks then gave a deed back to Stanisics for the property. They also say that the whole transaction was for Stanisics' benefit; that Parks had not met Stanisics before this time, had not seen the land, and did not see it for some weeks after. They testify that at Stanisics' suggestion Parks made some improvements upon the house; that he bought some furniture from Mrs. Blake and placed it in the house; and that he procured a policy of insurance to be made upon the furniture and collected the insurance after the fire. Parks further testifies that Stanisics, through Mrs. Blake, furnished the money to pay the insurance premium, and that, as he and Stanisics came from the insurance agent's office, Stanisics told him he had better leave town because the building was liable to burn, and he might go to the penitentiary; that he left and went to Hastings, and that the building burned while he was gone. In rebuttal Stanisics denies making this statement, and adheres to his explanation of the reasons why the

deeds were made in blank and why the blank assignment of the mortgage was made. The case was tried to the court without the intervention of a jury. The court made specific findings of fact, the most important of which are, in substance, that the transfer to Parks was without consideration; that Parks was financially irresponsible; that he permitted the property to be conveyed to him at the request and solicitation of the plaintiff; that he was not a *bona fide* purchaser; that the improvements made by him upon the premises were made by money furnished indirectly by the plaintiff, and were made at the request of the plaintiff and for his express benefit, and that Parks had no other interest in the premises except for reimbursement or compensation for his trouble and services in the matter. The court then found generally for the defendant and rendered a judgment dismissing the case.

The appellant insists that, upon the findings of the court below, the judgment should be for the plaintiff. He predicates this argument upon the fact that the court found that Parks moved furniture into the house and made repairs and additions thereto, and contends that this is equivalent to a finding that Parks had an insurable interest in the property. But he overlooks the legal effect of the further findings that the improvements were made at the instance and request of the plaintiff, and that Parks had no interest in the premises. The findings must be considered as a whole, and thus considered they will not support a judgment for the plaintiff. The principal complaint of the appellant is that the court drew the wrong conclusion as to the respective credibility of the witnesses, and that it should have found that Parks was a *bona fide* purchaser of the property. It seems to be conceded that if the story of Mrs. Blake and Parks is true, and that of the plaintiff untrue, there can be no recovery, and with this view we coincide. We think the evidence is amply sufficient to sustain the findings of the court as to the relations which Parks bore to the plaintiff, and as to his interest or lack of interest in the prop-

erty. The plaintiff claims as assignee of Mrs. Salisbury; but at the time she assigned the notes and mortgage she had absolutely no interest in either mortgage or property. Divested of shams and subterfuges, the effect of the conveyance from Williams to Estella McMasters and of the mortgage from her to Mrs. Salisbury and the assignment of the mortgage to the plaintiff is the same as if the plaintiff had conveyed his own property to himself, executed notes and a mortgage thereon to himself, and indorsed and assigned them to himself. It is clear that such a mortgage and assignment are ineffective to constitute a basis for a claim of right as long as they are in the original owner's hands, and that all this juggling with the title made no real change in the actual ownership of the property. When the mortgage was made to Mrs. Salisbury, she had no interest in the property. When she assigned the notes and mortgage, she had no such interest, and, when the policy was issued, neither she nor her assignee had any mortgage interest to which a contract of insurance in favor of either of them as mortgagee could attach. A contract of insurance is a contract of indemnity, and any person attempting to enforce a claim under such a contract must show an interest in the subject matter of the contract. Strictly speaking, that which is insured is not the property itself, but the interest of the person, who is indemnified against a loss occurring to him by reason of injury to the property or its total destruction. The district court found that at the time the policy of insurance was issued to Parks he had no insurable interest in the property, and that it was in fact the property of the plaintiff. Taken in connection with the lack of insurable interest in Mrs. Salisbury, this is not sufficient to support a contract of insurance for the benefit of her assigns. In such a case as this, the court will look behind the scenes, and will consider the facts as they actually are, and not as they appear to be. Questions as to the legal rights of the parties which might arise in case the district court had found that Parks was

Radford v. Wood.

the real owner of the property at the time the policy was issued might be very interesting, but these we are not called upon to determine. The findings of the district court in a law action tried to the court without the intervention of a jury are entitled to the same weight as the verdict of a jury, and will not be disturbed unless the evidence is clearly insufficient to support them.

The evidence sustains the findings, and the judgment of the district court must be

AFFIRMED.

**WILLIAM H. RADFORD ET AL., APPELLERS, v. THOMAS
WOOD, APPELLANT.**

FILED MARCH 20, 1909. No. 15,552.

Waters: OBSTRUCTIONS: INJUNCTION. R. constructed a dam across the intake of a subsidiary channel of a natural watercourse, and thereby retained all of the water in said river in the main channel. R. had not secured permission from the riparian owners on the main channel below said dam to thus increase the flow of water, nor had he proceeded under any statute to secure that right. R. brought an action to enjoin W., the owner of an island in the main channel of the river five miles below his dam, from destroying said obstruction, and W. filed a cross-petition to compel R. to remove it, and also prayed for damages. *Held*, That, as R. did not have lawful authority to construct said dam, a court of equity would not protect him in maintaining it, but, as the evidence was conflicting and left the court in doubt as to whether said obstruction damaged W., he would, under the circumstances of the case, be relegated to his action at law for damages.

APPEAL from the district court for Buffalo county:
JAMES N. PAUL, JUDGE. Reversed.

Warren Pratt and W. H. Thompson, for appellant.

W. D. Oldham and H. M. Sinclair, contra.

ROOT, J.

Action and cross-action for injunction. Plaintiffs prevailed, and defendant appeals.

The Platte river in the location where this controversy arose is divided into three channels. The middle channel, approximately 1,100 feet, and the south one, about 270 feet wide, need only be considered. The south channel is separated from the main one by Elm Island. Plaintiffs about four years preceding the commencement of the action constructed a series of dams between various small islands in the intake of the south channel, and thereby deflected into the main channel the waters that otherwise would have flowed down and through the former course. In consequence, the lands either owned or controlled by plaintiffs and other lands situated upon Elm Island and south of the south channel were rendered more arable, and Elm Island more accessible, than theretofore. Defendant owns an island containing about 20 acres situated in the main channel about 5 miles south of the intake of the south channel. Public bridges, forming part of the highway, connect said island with the mainland, and for many years it has been a valuable farm. During the latter part of May and early days of June in each year water, caused by melting snow in the mountains, flows down said river, and during that period only the waters of said stream cause any concern to riparian owners along said watercourse. Later in the year the waters subside so that in August and September all of said channels are practically dry. The land adjacent to said stream, and forming the islands therein, is loose and porous and the substratum sand. The water table in said lands rises or lowers in accord with the height of the water in the adjacent channel of the river.

Plaintiffs claim that defendant has threatened to do, if not restrained, will destroy the aforesaid dams which have been constructed at great cost and expense, and that defendant is insolvent. Defendant, while denying any intention to summarily interfere with said obstructions, alleges in his cross-petition that they are unlawful, and, as a result of their maintenance, an increased flow of water in the main channel has inundated the

farm and destroyed his crops; that thereby the banks of said island have been and now are continuously eroded, and the area of his farm has been and will continue to be diminished, and, in addition to a judgment for alleged accrued damages, asks for a mandatory injunction to compel plaintiffs to remove said obstructions. The court found generally for plaintiffs, granted them a perpetual injunction, and dismissed defendant's cross-petition without prejudice to an action at law.

Upon one point the facts are undisputed, and that is that the dams under consideration were constructed and are now maintained so as to obstruct and prevent the flow of water in a channel that has been a watercourse from time immemorial, and that plaintiffs constructed said dam without any authority of law. If any riparian owner of lands lying upon the south channel were complaining, it is clear that he would be entitled to relief. Defendant is not in that position, but the flow of water past his premises, instead of being diminished, is increased and, he avers, accelerated. The owner of land upon a natural watercourse is entitled to have the flow continue in its usual quantity and at its natural height, unless by appropriate proceedings known to the law some person has secured the right to alter natural conditions. If by reason of unlawful interference with the stream above his land the water is obstructed or drawn down, or made to run in unusual quantities or in an unusual manner, to his actual injury, the riparian owner has his action. *Gerrish v. Clough*, 48 N. H. 9, 2 Am. Rep. 165; *Merritt v. Parker*, 1 N. J. Law, 460; *East Jersey Water Co. v. Bigelow*, 60 N. J. Law, 201; *Tillotson v. Smith*, 32 N. H. 90, 64 Am. Dec. 355; *Pixley v. Clark*, 35 N. Y. 520. Plaintiffs neither secured permission from the lower riparian owners on the main channel to deflect therein the waters of the south channel, nor proceeded under any statute to improve their land and assess damages and benefits that might accrue by reason thereof, nor are they draining ponds or providing for the disposition of surface water

only. It does not seem to us that a court of equity should issue its mandate to protect plaintiffs in the enjoyment of a nuisance, even though it will not at the request of every person abate that nuisance.

Concerning defendant's cross-petition, we find that the evidence is not so clear and convincing upon the issue of whether said dams have damaged or will damage defendant as to justify an injunction in his favor. The writ should not issue unless the right therefor is clear, the damage complained of irreparable, and an action at law will not afford adequate relief. *Westbrook Mfg. Co. v. Warren*, 77 Me. 437. The trial judge evidently did not find the evidence so satisfactory as to warrant him in assessing such damages.

We have read the evidence carefully, and find it in hopeless and irreconcilable conflict upon the question of whether the deflection of the current of the south channel has caused defendant any damage. His property is about five miles down stream, and no one owning property on the main channel between defendant's island and the intake of the south channel has complained that his property had been injuriously affected by the construction of said dams, and the testimony shows that the water in the main channel has not overflowed the river banks for many years last past. The evidence shows, and we take judicial notice of the fact, that the thread of the stream in the Platte fluctuates from year to year, and, at times, during the year; that, as the current shifts from one side of the stream to the other, the banks are often eroded or accreted, and more or less changes are made in the contour of the islands in the river. The causes for such deflections and changes, although at times apparent, are often obscure. Defendant's evidence tends to prove that the closing of the intake referred to will, when the Platte is well filled with water, raise the crest of the water in the main channel five inches, and with this change that the water table of the adjacent lands, including defendant's island, will be uplifted that much; but

the testimony seems undisputed that during the first and second years of the maintenance of the dams no damages whatever accrued to defendant's land, and whether the erosion of the banks of that island in the next succeeding two years was caused by the closing of said intake or by some unexplained change in the current of said river is a matter of more or less speculation. The water marks observed and known along said channel fail to indicate that the water in the main channel during the third and fourth years said dams were maintained was higher than during the preceding years, for which defendant does not claim damages.

On the entire record we are satisfied that an injunction should not issue for the benefit of either party, and that defendant should be relegated to his action at law. The judgment of the district court, therefore, is reversed, and plaintiffs' petition and defendant's cross-petition dismissed at plaintiffs' costs, but without prejudice to an action at law by defendant, and without prejudice to an action in equity in a proper case.

JUDGMENT ACCORDINGLY.

GEORGE A. QUINBY ET AL., APPELLEES, V. UNION PACIFIC
RAILROAD COMPANY, APPELLANT.

FILED MARCH 20, 1909. No. 15,598.

1. **TRIAL: INSTRUCTIONS.** "An instruction submitting to the jury as an issue of fact a question material to the case, regarding which there is no evidence to support a finding, is erroneous." *Chamberlain Banking House v. Woolsey*, 60 Neb. 516.
2. **CARRIERS: LIABILITY.** Q., a shipper, was notified by the agent of the railway company to load his horses promptly at 6 o'clock. Q. agreed with the carrier that, in consideration of free transportation for one person, he would furnish a caretaker to accompany said horses, would load and unload them, and care for the stock

Quincy v. Union P. R. Co.

while in the car and yards of the carrier. Immediately after the horses were placed in the car both the shipper and caretaker departed, and said animals were left in the yards of the carrier. An hour later a stranger noticed that the horses were in an excited condition, and were kicking, biting and trampling each other. The evidence did not tend to prove that said condition arose from any cause other than the inherent propensities of the horses and the delay in starting the car on its trip. *Held*, That the carrier was not liable to the shipper for his loss.

APPEAL from the district court for Dawson county:
BRUNO O. HOSTETLER, JUDGE. *Affirmed in part, and reversed in part.*

Edson Rich and John A. Sheean, for appellant.

John H. Linderman, *contra*.

ROOT, J.

Action for damages because of the alleged negligence of defendant. Plaintiffs prevailed, and defendant appeals. The verdict responded separately to two causes of action, and it was not argued at the bar that the verdict was wrong as to the second cause of action, and the judgment to that extent will be affirmed.

Concerning the first cause of action, plaintiffs in December, 1906, owned and desired to ship from Lexington, Nebraska, to Denver, Colorado, 20 valuable draft horses. In order that said horses might be transported with dispatch, plaintiffs waited for a fast freight. Defendant's agent in the afternoon of December 7 notified plaintiffs that they must load the horses by 6 o'clock or the car would not be included in said train. Plaintiffs loaded the horses as directed, and the car remained on the sidetrack opposite the loading chute. In consideration of free transportation to Denver and return for a caretaker, plaintiffs agreed with defendant to load, unload and reload said horses, and to feed, water and tend them in the stock yards and while in the car and on the premises of defendant at plaintiffs' cost and risk, and assumed the

risks arising from the stock being wild, unruly, weak, or in maiming each other or themselves. Immediately after the horses were loaded Mr. Quinby and the caretaker went up town from the railway yards. The caretaker ate his supper, and returned to the depot, and there remained until after 7 o'clock, when he was notified that the horses were injuring each other. About an hour after the horses were loaded a witness, not connected with either party hereto, was attracted to the car, and noticed that one horse was down and the others were "milling," whereupon he went up town to notify Mr. Quinby. Another individual soon thereafter noticed that the horses were stampeded, were pushing, crowding, kicking and biting each other, and some of them were piled up in a heap in one end of the car. Plaintiffs, when notified, refused to do anything for the horses, and a volunteer and defendant's employees opened the car door and unloaded the car. One horse was dead, another died soon thereafter. Two animals were seriously, and others considerably, injured.

The charge of negligence is that the defendant negligently and carelessly left the carload of horses on the side-track for three hours after dark, and then negligently and carelessly operated a train on the main track, and thereby caused said horses to stampede and become injured. Defendant claimed immunity because of the contract aforesaid, because of its alleged lack of negligence, and for the reason that the injuries were occasioned by the natural propensities of the animals. The evidence on the important facts does not conflict. It is undisputed that horses, when loaded into a car, are liable to become nervous and frightened, and, when in that condition, will crowd, kick, bite and push each other and endeavor to get out of the car, and in consequence may "pile up"; that, as soon as the car is propelled by the engine the animals will brace themselves and stand quiet, and thereafter a recurrence of "car fright" is not likely to happen. Witnesses who were experienced ship-

pers testified that horses should not be loaded until the locomotive was ready to take the car out of the yards, although trouble might not happen and horses might remain for more than an hour in the car before it was moved, and not injure themselves or each other. The fast freight did not arrive in Lexington until 7 o'clock on the evening in question. There is some evidence to indicate that one other freight train was then in the yards at that point, but no evidence whatever to show that, while the car loaded with these horses was standing on the siding, any train passed on the main track. There is no evidence to show when the horses were first frightened, but about 7 o'clock, when their plight was discovered, they were steaming with perspiration, and must have been in that excited condition for some time.

Over defendant's objections witnesses were permitted to testify to the probable effect that would result from operating a train on the main track while horses were standing in a car on the side-track, and the court instructed the jury that, if the horses were unnecessarily and negligently left on the side-track near the main line for $1\frac{1}{2}$ hours after dark, and during that time defendant by negligence and carelessness in operating a train on its main track stampeded the horses and caused the injuries to them, plaintiffs should recover. There is not, as we read the record, any evidence whatever that defendant operated any of its trains negligently, or even that a passing train frightened the horses. So far as a deduction of cause from effect may be drawn, the only reasonable inference in the state of the record is that the horses were seized with car fright, induced by their inherent propensities, a condition for which defendant is not responsible. 1 Hutchinson, Carriers (3d ed.), sec. 335; *Evans v. Fitchburg R. Co.*, 111 Mass. 142, 15 Am. Rep. 19.

It is argued that a common carrier of live stock is an insurer, and *Nelson v. Chicago, B. & Q. R. Co.*, 78 Neb. 57, is cited. In that case it was held, upon the facts, that

it was for the jury to say whether a delay in the transportation of fat cattle was unreasonable, and the recovery was not for injuries caused by the propensities of the animals, but for a deterioration resulting from an unnecessary and unreasonable delay in their transportation, something without the control of the shipper, but within that of the carrier.

It is also suggested that the burden was on defendant to show that the injuries resulted from a cause for which it was not liable. This rule might apply if the injuries had occurred while the horses were in course of shipment, but in the case at bar the injuries were not occasioned by the transportation of the stock, nor was the car in any manner defective, nor had it been moved from the exact point where it was loaded. The plaintiffs had agreed to care for the horses while in defendant's yards, and had furnished a caretaker for that purpose. Defendant, unless notified that the caretaker had abandoned the animals, or unless charged with knowledge or notice of such facts as would lead a reasonable person to believe that the caretaker had not been furnished or had abandoned his charge, had a right to rely on plaintiffs caring for the animals while in the car awaiting shipment. 2 Hutchinson, Carriers (3d ed.), sec. 642. Nor is it claimed that the caretaker had abandoned his charge. Had the caretaker been attending to his duty, he might have quieted the animals when they first became restless, or, if he could not do so, he could easily have unloaded them with little effort on his part. It was not a part of the carrier's duty, under the circumstances of this case, to detail an employee to watch the horses and report if they were becoming restless. and the burden was on plaintiffs to show that the injuries resulted from defendant's negligence. *Chicago, B. & Q. R. Co. v. Williams*, 61 Neb. 608; *Chicago, St. P., M. & O. R. Co. v. Schuldt*, 66 Neb. 43.

We conclude that the evidence did not warrant the court submitting to the jury so much of its charge as re-

Benedict v. Minton.

ferred to the negligent operation of trains on defendant's track, and, for that reason, the judgment must be reversed. *Chamberlain Banking House v. Woolsey*, 60 Neb. 516. Furthermore, we are of opinion that the evidence introduced on the trial of this case is insufficient to sustain a judgment on plaintiffs' first cause of action.

The judgment therefore is reversed as to the first, and affirmed as to the second, cause of action; and each party will pay its own costs in this court.

JUDGMENT ACCORDINGLY.

LEWIS BENEDICT ET AL., APPELLEES, v. EDNA L. MINTON
ET AL., APPELLANTS.

FILED MARCH 20, 1909. No. 15,615.

Specific Performance: PLEADING: SUFFICIENCY. Plaintiffs requested specific performance of a contract. Defendants admitted the execution of said contract, but not all of the facts essential to entitle plaintiffs to a decree. Defendants also pleaded facts which, if true, constituted a defense to the petition. *Held*, That the district court erred in sustaining a general demurrer to said answer.

APPEAL from the district court for Frontier county:
ROBERT C. ORR, JUDGE. *Reversed*.

Starr & Reeder, for appellants.

J. A. Williams, contra.

ROOT, J.

Plaintiffs alleged that on December 11, 1905, plaintiff Benedict owned in fee simple certain lands, and on said day, without consideration, signed, acknowledged and delivered to defendant Edna Minton a deed conveying said real estate to her upon the following conditions: "This deed not to become absolute until after my death, I re-

taining the use and control of the land during my life; my intention being to retain a life lease to the above premises. It is also agreed and understood that should I desire to sell the land during my lifetime that the grantee will join me in a deed, providing I pay her for the improvements she and her husband place on the land." Plaintiffs further alleged that defendants had not improved said land; that Benedict sold said real estate to plaintiff Lindbloom, and defendants refuse to convey. The prayer is for a specific performance of said contract.

Defendants answered by way of general denial, except as to specific admissions, denied that said deed was without consideration, and alleged: That theretofore the land had been conveyed by them to Benedict to secure the payment of \$300, and the conveyance, although in form an absolute deed, was a mortgage; that, when said deed was executed, it was orally agreed that defendants should have the use of said land during Benedict's lifetime and should deliver to him one-fourth of the crops grown on said farm, and that the grantee should also nurse and care for the grantor when he was sick or in need of care; that Benedict is an aged person afflicted with cancer, and that defendants took him into their home, boarded, nursed and cared for him, and thereby returned to him more than \$300 in value; and that they are ready and willing and offer to continue such care and nursing and to deliver to said Benedict one-fourth of the crops grown on said farm during his natural life. To this answer plaintiffs filed a general demurrer, which was sustained. Defendants elected to stand on their answer, and a decree was rendered in favor of plaintiffs. Defendants appeal.

Defendants assert that the petition does not state facts sufficient to constitute a cause of action in plaintiffs' favor, and, under the well-established rule that a demurrer to an answer searches the record and will be applied to a defective petition, that the action should be dismissed. We do not agree with counsel. Section 10854, Ann. St. 1907, commands the court to construe instruments creat-

ing, conveying, or requiring the creation or conveyance of real estate, or an interest therein, so as to carry into effect the true "interest" (intent) of the parties, so far as that intent can be collected from the entire instrument and in accord with the rules of law. Acting in conformity with the liberal spirit of the statute, we have refused to be bound by highly technical rules of construction with reference to conveyances of real estate, but give to each word and sentence in those documents such significance as will carry into effect the true intent of the parties thereto. *Rupert v. Penner*, 35 Neb. 587; *Albin v. Parmele*, 70 Neb. 740. Assuming that all of the facts stated in the petition are true, we are not willing to hold that plaintiffs are not entitled to any relief. On the other hand, all of those facts were not admitted in the answer, and if the affirmative allegations therein are true, and plaintiffs cannot qualify or avoid them, plaintiffs are not entitled to the relief they demand. We have not been favored with briefs or argument on this point, and shall not pursue the subject further.

The judgment of the district court therefore is reversed and the cause remanded for further proceedings.

REVERSED.

STATE, EX REL. LOUIS V. SHEFFER, APPELLANT, v. ABEL B. FULLER ET AL., APPELLEES.

FILED MARCH 20, 1909. No. 16,023.

1. **Drainage Districts: ACT AUTHORIZING: VALIDITY.** That part of chapter 153, laws 1907 (Ann. St. 1907, sec. 5598 *et seq.*), which authorizes the commissioners of one county upon a proper petition to establish the boundaries of a drainage district so as to include land in an adjoining county, is not void.
2. ———: **BOUNDARIES.** The boundaries of drainage districts created under said act may lawfully overlap.
3. ———: ———: **CHANGES.** The commissioners at any time before the rights of third persons have accrued may alter the boundaries

State v. Fuller.

of such proposed district, but, if a change is made, they must give the landowners within said district three weeks' notice of the election, and therein correctly describe the boundaries of the proposed district.

4. ———: ———: ———. In case the commissioners, after establishing the boundaries of a proposed district under said act, publish notice of the election provided by statute, and thereafter, before election, modify such boundaries, but do not change the notice, a landowner within the altered district who did not participate in said election may, if he acts promptly, maintain an action in *quo warranto* to dissolve said district and oust its directors from office.

APPEAL from the district court for Saunders county:
GEORGE F. CORCORAN, JUDGE. *Reversed.*

H. A. Reese, for appellant.

T. F. A. Williams, *contra*.

B. E. Hendricks, *amicus curiæ*.

ROOT, J.

Action in *quo warranto* to dissolve the Salt Creek Valley Drainage District and oust respondents from acting as directors thereof. A general demurrer to the petition was sustained, and, relator electing to stand upon his pleading, the action was dismissed. Relator appeals. The drainage district, if organized, was created under the act of March 27, 1907 (Ann. St. 1907, sec. 5598 *et seq.*). The terms of the statute are referred to and thoroughly discussed in *State v. Hanson*, 80 Neb. 724, and reference is made thereto for an understanding of the act.

1. It is argued that the statute is void in so far as it assumes to authorize the creation of a drainage district within two or more counties; that the proceedings in the case at bar were instituted and carried on in Saunders county, where the greater part of said district is situate, and that, as relator's land is in Cass county, they are void as to his real estate. We have not been cited any

authority to sustain the proposition advanced and are not inclined to adopt it. It is competent for the state to authorize the creation of governmental agencies for the enforcement of its police power, and for the legislature to clothe county commissioners, supervisors, or any other administrative officer or board with authority to establish a district for the reclamation of swamp, overflowed or wet lands, or lands so subject to inundation as to destroy their utility or to constitute a menace to the public health. The fact that such bodies of land may extend into two or more counties does not render the legislature powerless to include contiguous tracts into one district for the more convenient exercise of the police power. *Hagar v. Reclamation District*, 111 U. S. 701; *Reclamation District v. Hagar*, 66 Cal. 54; *Shaw v. State*, 97 Ind. 23; *Hudson v. Bunch*, 116 Ind. 63; *Updegraff v. Palmer*, 107 Ind. 181; *People v. Draper*, 15 N. Y. 532. That the county board wherein the greater area of the proposed district is situated should act is a reasonable provision. Nor does the act amend the statutes relating to the powers and duties of county commissioners. *Nebraska Telephone Co. v. Cornell*, 59 Neb. 737.

2. Relator alleges that his land is within the limits of another proposed drainage district, and that the law does not authorize or contemplate the overlapping of those districts so that real estate may be subject to separate assessments in as many distinct districts. The statute does not refer in specific terms to the overlapping of districts, nor does it forbid their formation. While some complications may arise in the prosecution of public improvements on land within two or more districts and in assessments to pay therefor, yet we are of opinion that the objection made is not a serious one. Relator's land can only be assessed for, and to the extent of, benefits actually bestowed by virtue of the improvements made by any particular district. The assessments can only be laid after notice, and, if the levy is not supported by the facts, the landowner has an ample remedy by appeal to the courts

wherein upon inquiry the truth may be ascertained and a judgment rendered that will amply protect him in his property rights. If his land may be improved by the construction of ditches or dykes in two or more districts, he ought to pay to the limit of those benefits. To hold otherwise would permit the owner of a large tract of land included in a district which had not benefited that land to any appreciable extent to receive the advantage of an improvement made by another district, and yet escape payment therefor. In *Shannon v. City of Omaha*, 73 Neb. 507, we sustained a municipality in the creation of a second and smaller sewer district within the boundaries of a larger one, and upheld special assessments laid in the smaller district, and we think that the principle therein announced is pertinent in the instant case.

3. The application for the formation of said district was filed September 25, and five days later an order was made by the commissioners of Saunders county fixing the boundaries of said district. An election was called for October 26, and notices were duly published in a newspaper in Cass and one in Saunders county. This notice, as the statute required, described the boundaries of the proposed district as fixed by the county commissioners. On the 23d of October certain persons, owning about 1,000 acres of land within the proposed district, appeared and made a showing that their lands were already within a drainage district created for the purpose of reclaiming lands adjacent to Wahoo and Clear creeks, and that neither equity, justice nor the public welfare warranted including said lands within the boundaries of respondent district, and thereupon, without notice, said commissioners entered an order modifying their first one and excluding the aforesaid land from respondent district. Notice was not given of the making of the second order except to the seventeen parties who had petitioned for the creation of respondent district. October 26, the day fixed in the published notice, an election was held, and a majority of the votes cast favored the creation of a drainage district,

and directors were elected who have since qualified. Relator did not attend or vote at said election, nor did the owners of a majority of the acres included in said territory thus vote. Section 5601, Ann. St. 1907, provides that "any one asking shall be given a hearing as to the boundary," but provision is not made for notice or that the commissioners may not proceed forthwith. The board might well have postponed immediate action. Their orders under said statute are not subject to review by appeal or error proceedings, but their discretion while acting under said statute is practically unlimited. In *State v. Ross*, 82 Neb. 414, in construing the power of a county board in drainage proceedings initiated under sections 5500 *et seq.*, Ann. St. 1907, it was held that a preliminary order made might lawfully be revoked where the rights of third parties had not accrued. No provision is made in either statute for a reconsideration of an order made by the commissioners. In *Clark v. Nebraska Nat. Bank*, 49 Neb. 800, it was held that, if an *ex parte* order is made by a court or judge, the party affected thereby may in a proper case have it set aside, and must request the court to so act before appealing to this court. While the commissioners do not exercise judicial power or act according to the course of the common law under said statute and their orders cannot be reviewed in direct proceedings, yet, upon principle, we incline to the belief that the commissioners had authority, before the electors had voted, to establish the drainage district, to modify their order first made, and change the boundaries of the tentative district, and that it was the duty of landowners therein to bring to the commissioners' attention any facts that would tend to prove that a mistake had been made in fixing the limits of the proposed district.

The vital proposition in this case is whether, under the circumstances, notice not having been given of the change in the boundaries of the proposed district, the election was void. In *State v. Hanson*, 80 Neb. 724, we held that an election under said act was not an election within the

Kimmerly v. McMichael.

meaning of the constitution or the general statutes, but the district could only become legally organized and endowed with power to perform its functions by an affirmative vote of a majority of the votes cast at said election. The statute does not direct that actual notice shall be given the landowners of the limits of the proposed district, but that notice shall be published once each week for three weeks in a newspaper published at the county seat of every county wherein any of the land of the proposed district is situated. The notice must contain the title to the act and a description of the boundaries of the proposed district as fixed by the county commissioners.

We are of opinion that landowners have a right to rely upon the district being formed, if created at all, in conformity with said notice, and, if the commissioners change those boundaries so that the notice does not truly describe them, any landowner who did not have knowledge of the change or participate in that election may, by timely appeal to the courts, successfully challenge the legal existence of said district. *City of Atlanta v. Gabbett*, 93 Ga. 266; *Payson v. People*, 175 Ill. 267.

The judgment of the district court therefore is reversed and the cause remanded for further proceedings.

REVERSED.

IDA A. KIMMERLY, APPELLEE, v. JOHN W. MCMICHAEL
ET AL., APPELLANTS.

FILED MARCH 20, 1909. No. 15,563.

1. **Homestead: QUIETING TITLE: DECREE.** In a suit by a divorced woman to quiet her title to the former homestead, the court may find that the property was not her separate estate and at the same time subject it to her lien for alimony by canceling a void deed which had been executed in violation of her homestead rights, where the pleadings and proof warrant such relief.
2. **Pleading: CONSTRUCTION.** After decree a petition in equity not attacked by motion or demurrer will be liberally construed by the

Kimmerly v. McMichael.

supreme court for the purpose of upholding the pro
the trial court.

3. Judgment: PLEADING: DECREE. In a suit in equity which plaintiff is entitled under his petition and prayer granted pursuant to his general prayer, where defendant stand the issue and resist his allegations by evidence.
4. Alimony: DECREE: RES JUDICATA. Allowance of alimony of a wife's interest in her husband's property is not a condition which prevents her from recovering a decree canceled formerly executed in violation of her homestead interest interfering with her lien for alimony.
5. Appeal: HARMLESS ERROR. A decree in equity should be reversed for a mere technical error which does not prejudice party to the suit.
6. Homestead: INCUMBRANCE: VALIDITY. A mortgage on property worth less than \$2,000, when executed by the husband and signed nor acknowledged by the wife, is void.

APPEAL from the district court for Grant county.

R. HANNA, JUDGE. *Affirmed.*

William Mitchell, for appellants.

O. C. Tarpenning, contra.

ROSE, J.

Defendant John W. McMichael and plaintiff band and wife from March 26, 1898, to July 9, 1906, the district court for Saunders county granted a divorce July 9, 1906, restored her maiden name Kimmerly and allowed her alimony in the sum of \$500. The present suit was brought in the district court for Grant county. The subject of litigation is a homestead in Hyannis worth between \$500 and \$1,200. The court deeded the property to her husband March 26, 1898. When they were bound by the marriage relation July 23, 1906, the husband attempted by means of a deed which his wife did not join to convey the property to codefendant Perry A. Yeast. The trial court refused to do so at the time of the attempted transfer to Yeast. The estate was the homestead of the McMichael.

Yeast's deed and confirmed the title in grantor, where the property may be subjected to plaintiff's lien for alimony. Defendants appeal.

The principal objection to the decree is that it has no support in the pleadings. It is strenuously argued by defendants that the decree fails to respond to any allegation or prayer of the petition; that it grants plaintiff relief unasked; that it subjects the property to the decree for alimony under a petition to quiet plaintiff's title; that plaintiff pleaded no interest in the property as a family homestead; and that she did not pray for the protection of any homestead right. All these propositions are included in a single inquiry into the sufficiency of the petition to support the decree.

The petition is not skillfully drawn, but one paragraph contains an averment that plaintiff and her husband made the house and lot in Hyannis their home, and lived and resided there March 16, 1904, and for a long time prior thereto. In another paragraph it is alleged that the real estate described in the petition was March 16, 1904, "and a long time prior and at all times since, the homestead of this plaintiff." It is true the record shows that plaintiff pleaded she owned the property in her own right; that she bought it with her own money; that it was her separate estate; that she prayed for relief accordingly; that she offered proof in support of such averments; and that the trial court found against her on this branch of the case. It does not follow, however, that she thus lost her right to a decree canceling the deed which was executed by her husband in violation of her homestead interests, if her petition and proof warrant such relief. The averments of the petition as to the homestead were not attacked by motion or demurrer, but were separately denied in different paragraphs of the answer. Defects in plaintiff's allegations did not mislead or prejudice defendants. They understood that plaintiff had asserted her homestead rights as they existed March 16, 1904, when plaintiff transferred the title to her husband, and as they existed

Kimmerly v. McMichael.

January 23, 1906, when the husband deeded the property to his codefendant Yeast. Defendants also understood that the homestead mentioned in the petition was the homestead of both husband and wife. Both parties to the suit offered proof of the existence and place of the homestead January 23, 1906. When McMichael was testifying as a witness for defendants, he was asked on direct examination: "You may state whether the property in controversy was the homestead of you and your family at the time you sold the property in controversy to Perry A. Yeast in January, 1906." His answer was, "No, sir." Defendants adduced other testimony of like import, and also attempted to prove that the family homestead consisted of a house and a quarter section of land three miles from Hyannis. The court heard the testimony on both sides of the issue as to the homestead and on abundant evidence found in favor of plaintiff.

After proof has been adduced on both sides of a controverted issue and a final decree entered, the petition, when not assailed by motion or demurrer, should be liberally construed by the reviewing court and sustained, "if the essential elements of plaintiff's case may be implied from its terms by reasonable intendment." *Sorensen v. Sorensen*, 68 Neb. 483; *Western Travelers Accident Ass'n v. Tomson*, 72 Neb. 674; *Chicago, R. I. & P. R. Co. v. Kerr*, 74 Neb. 1; *Bennett v. Bennett*, 65 Neb. 432; *Omaha Nat. Bank v. Kiper*, 60 Neb. 33; *American Fire Ins. Co. v. Landfare*, 56 Neb. 482. Under the rule stated, plaintiff's petition, as it appears in the record presented by defendants, must be held sufficient to support the decree. After judgment undue importance should not be attached to technical objections to a petition in a suit in equity fairly tried and correctly decided, where the complaining parties understood the issue, adduced proof thereon and submitted the controversy to the court without attacking the pleading by motion or demurrer.

The decree is said to be erroneous because it grants plaintiff relief for which there is no prayer. There is a

specific prayer for the cancelation of the deed from McMichael to Yeast, and "for such other and further relief as equity may demand." In *Wood v. Speck*, 78 Neb. 435, Mr. Commissioner EPPERSON said: "Generally, under the rule of equity pleading, if a litigant is not entitled to the relief specifically asked for, he may, nevertheless, recover under the general prayer whatever the proof shows he is entitled to, if consistent with the allegations of his pleading." Under this rule the relief granted in the present case was within the prayer of the petition.

It is asserted the decree must be reversed on the ground that it invades property rights adjudicated in defendants' favor in the suit for divorce. It was therein decreed that "plaintiff have and recover from defendant as alimony in lieu of her interest in property of defendant the sum of \$1,000." There is no conflict whatever between the decrees. In the present case the trial court did not award plaintiff any additional property or take any from McMichael, but restored to him the title to the homestead. Yeast's deed was canceled, but he was not a party to the divorce suit and the judgment therein settled no property rights or controversies between him and plaintiff. Under a statute of this state, alimony may become a lien on the homestead, though the title thereto is in the husband when the divorce is granted. *Best v. Zutavern*, 53 Neb. 604; *Fraaman v. Fraaman*, 64 Neb. 472. Plaintiff's right to assert and enforce such a lien and to a decree canceling a deed executed in utter disregard of her homestead interests was not decided against her in the suit for divorce. The validity of the deed through which McMichael attempted to convey the family homestead in violation of law was neither presented nor adjudicated in the decree for alimony. The plea of *res judicata* cannot be sustained.

Defendants pleaded in their answer that McMichael deeded the house and lot in Hyannis to Yeast in consideration of the settlement and release of a debt of \$600. It developed during the trial that this debt was secured by a mortgage on the property described in the deed. The

Collister v. Ritzhaupt.

mortgage antedated the deed about a year, and was not signed or acknowledged by mortgagor's wife. The district court canceled the mortgage, though it was not mentioned in plaintiff's petition, and this is assigned as error. The error was without prejudice to defendants and is not sufficient cause for reversal. The mortgagor testified the debt was canceled by the execution of the deed. Yeast, the holder of the mortgage, states positively on his examination as a witness in his own behalf that he makes no claim whatever under it. In addition, the record shows conclusively that it had no greater significance than the void deed by which it was replaced. It was a mortgage on the homestead and was neither signed nor executed by mortgagor's wife. The homestead being of less value than \$2,000, the mortgage thereon was absolutely void. *Interstate Savings & Loan Ass'n v. Strine*, 58 Neb. 133; *Kloke v. Wolff*, 78 Neb. 504; *Whitlock v. Gosson*, 35 Neb. 829; *Solt v. Anderson*, 71 Neb. 826; *Horbach v. Tyrrell*, 48 Neb. 514; *Havemeyer v. Dahn*, 48 Neb. 536. It follows that in so far as the mortgage is involved no benefit would accrue to either of defendants from a reversal of the decree.

There is no prejudicial error in the proceedings of the district court, and the judgment is

AFFIRMED.

TRUE COLLISTER, APPELLEE, V. ARTHUR RITZHAUPT,
APPELLANT.

FILED MARCH 20, 1909. No. 15,622.

1. Bastards: INSTRUCTIONS: REVIEW. Where testimony has been admitted on behalf of defendant in a bastardy case in violation of the rule that his reputation for chastity is not an issue, he cannot predicate error on a proper instruction to the jury to disregard it.
2. ———: ———: ———. Where the testimony adduced on both sides of a bastardy case has been fully submitted to the jury

by proper instructions, it is not error to refuse a requested instruction making prominent a circumstance relating to the period of gestation.

3. ———: COMPLAINT: WAIVER. In a bastardy case, a defendant who appears before a justice of the peace and enters into a recognition to appear at the next term of the district court to answer the accusation against him, without objecting to the complaint, waives the objection that it fails to state the child, "if born alive, may be a bastard."
4. ———: ———: ———. A defendant who appears before the district court in a bastardy case and pleads not guilty to the charge, without objecting to the complaint, waives the objection that it fails to state the child, "if born alive, may be a bastard."

APPEAL from the district court for Frontier county:
ROBERT C. ORR, JUDGE. *Affirmed.*

L. M. Graham and Morlan, Ritchie & Wolff, for appellant.

J. L. White and E. P. Pyle, contra.

ROSE, J.

Defendant was charged with the paternity of plaintiff's illegitimate child, a jury found him guilty, and the trial court directed him to pay for its support the sum of \$1,500 in quarterly instalments of \$25 each. From this judgment defendant appeals, and urges the following grounds for reversal: (1) The verdict is not sustained by sufficient evidence; (2) the trial court erred in giving an instruction which directed the jury to disregard testimony in relation to defendant's chastity and virtue; (3) there was error in the failure of the court to give an instruction directing the attention of the jury to testimony relating to the period of gestation; (4) the complaint omits a statutory requirement.

1. Every syllable of testimony offered by both parties has been carefully examined and considered in connection with section 5, ch. 37, Comp. St. 1907, providing that in a case of this kind the jury, on behalf of defendant,

shall "take into consideration any want of credibility in the mother," and "any variations in her testimony before the justice and that before the jury." The result is that no reason exists for setting aside the verdict for insufficiency of evidence.

2. It is argued that the court erred in instructing the jury as follows: "The jury are instructed that some testimony has been introduced in regard to the character of the defendant for chastity and virtue. You are further instructed that the character and reputation of the defendant for chastity and virtue are not at issue in this case, and you will entirely disregard such testimony." This instruction was given to cure error in the admission of testimony on behalf of defendant, who undertook to prove by his landlady his reputation for chastity. When she was testifying as a witness for defendant, she was asked: "What, if anything, have you heard in regard to his being unchaste, or any claim of it, prior to this case?" Over the objection of plaintiff the court permitted the witness to answer this question in violation of the rule that the character and reputation of defendant for chastity and virtue are not in issue in a bastardy case. *Stoppert v. Nierle*, 45 Neb. 105; 5 Cyc. 662. The instruction is criticised because the court failed to limit its application to defendant's "previous" reputation for chastity, and because it permitted the jury to disregard proper evidence that defendant's conduct showed he was not on intimate relations with plaintiff. Defendant's questions on his own behalf brought out the only testimony relating to his reputation for chastity, and "such testimony" alone the jury were directed by the trial court to disregard. There was no direction to disregard testimony that the witnesses for defendant had observed no act showing his intimacy with plaintiff. As applied to the erroneously admitted evidence, the instruction correctly stated the rule. *Stoppert v. Nierle*, 45 Neb. 105. Having led the court into the error which the instruction was intended to correct, defendant is not in a situation to demand a reversal for mere

lack of refinement in a correct instruction to the jury to disregard the testimony improperly admitted in his favor. If an instruction more specific was desired, it should have been requested.

3. The third point argued is that the court erred in refusing to give the following instruction: "If you find from the evidence that the plaintiff was on or about September 2, 1907, delivered of a bastard child, as alleged, which is still alive, and if you find from the evidence that the probable period of gestation of this child differed from the length of time between the birth of the child and the date when the plaintiff testified the intercourse occurred, this is a circumstance to be considered by you in deciding whether the preponderance of the evidence is that the defendant is the father of the child." To show this instruction should have been given, it is asserted that the child was born 263 days after the time fixed by plaintiff in her testimony as the date of her first act of intercourse with defendant, and that the testimony of the physician who was present at the birth of the child showed the probable period of gestation was about 300 days. In this connection it is argued that the charge of bastardy creates in the minds of jurors a strong prejudice against defendant; that coition is necessarily secret, and that, owing to the sympathy of mankind for women in trouble, jurors are prone to listen to plaintiff alone and close their eyes to circumstances which discredit her story. For these reasons, it is said the court erred in refusing to give the instruction quoted. In the unhappy situation in which defendant describes himself as a suitor, the record shows the trial court repeatedly erred in admitting testimony in his favor, and gave among other instructions the following: "The court instructs the jury: The charge made against the defendant is, in its nature, one well calculated to create strong prejudice against the accused, and the attention of the jury is directed to the difficulty, growing out of the nature of the unusual circumstances connected with the commission of such an offense, in de-

fending against the accusation." The whole case was submitted to the jury by instructions favorable to defendant. The physician testified, in substance, that the normal period of gestation was 280 days; that for healthy, vigorous children the longest period was about 320 days, and the shortest about 210 days; and that, from his examination of plaintiff's child, he thought the period of gestation was about 300 days. The latter statement, indefinite as it is, was qualified still further by other testimony of the witness. In answer to the question, "As a physician, can you tell about the period of gestation upon examining the child after its birth?" he replied: "You can in some cases, if you have a good history of the case." The record contains evidence on behalf of plaintiff to sustain a finding that the child was born 277 days after the first act of coition between the parties to this suit. The jury were duly cautioned by instructions to consider the credibility and interest of the witnesses, and were often reminded that the burden of proof was on plaintiff to establish her complaint by a preponderance of the evidence. The testimony was easily understood by the jury, and the special reference to the particular circumstance singled out and made prominent by the instruction was not essential to defendant's rights. The record shows that he had a fair trial without the requested instruction, and there was no error in refusing to give it.

4. The last point presented is: "The complaint does not state facts sufficient to constitute a cause of action against the defendant and does not state facts sufficient to give the court jurisdiction." This question was raised for the first time in the district court by an oral objection to the introduction of evidence. It is based on the failure of plaintiff to insert in the complaint before the justice of the peace the words of the statute that the child "if born alive, may be a bastard." The prosecution is a civil proceeding. *Cottrell v. State*, 9 Neb. 125; *Kremling v. Lallman*, 16 Neb. 280; *Strickler v. Grass*, 32 Neb. 811; *In re Walker*, 61 Neb. 803. In this state rights conferred by

Collister v. Ritzhaupt.

statute upon defendant in a bastardy proceeding may be waived by him. *Strickler v. Grass*, 32 Neb. 811. Irregularities in the preliminary steps may be waived by defendant the same as in other civil cases. *Strickler v. Grass*, 32 Neb. 811; *Rose v. People*, 81 Ill. App. 128, 5 Cyc. 665. The transcript shows that defendant appeared before the justice of the peace, and entered into a recognizance to appear at the next term of the district court to answer the accusation against him, and was released from custody thereunder. This was a waiver of any defect in the information, since, without objection thereto, he obligated himself to answer the accusation in the district court. *Cook v. People*, 51 Ill. 143; *Collins v. Connors*, 81 Mass. 49. Defects in the information having been waived, the filing of the transcript gave the district court jurisdiction. *Altschuler v. Alyaza*, 16 Neb. 631.

The record further shows that defendant October 8, 1907, after the child had been "born alive," and when it was "a bastard," appeared in the district court pursuant to his recognizance, and, "being asked by the court whether he is guilty or not guilty of the offense charged, answered, 'Not guilty,' which plea was entered on the complaint." The plea of not guilty was entered without objection to the sufficiency of the complaint, and at the trial thereunder it was conclusively shown that the child was "born alive" and was "a bastard." Objections to the complaint were waived by defendant. *State v. Johnson*, 89 Ia. 1; 5 Cyc. 665. It is therefore unnecessary to consider the merits of the objection that the complaint omits a statutory requirement.

There is no error in the record of which defendant can complain, and the judgment is

AFFIRMED.

VACLAV HRUBY ET AL., APPELLANTS, V. SOVEREIGN CAMP,
WOODMEN OF THE WORLD, APPELLEE.

FILED MARCH 20, 1909. No. 15,483.

Appeal: LAW OF CASE. "When the evidence is substantially the same as on a former appeal, the weight and effect to be given such evidence must be considered as foreclosed by the former decision on that point." *Mead v. Tzschuck*, 57 Neb. 615.

APPEAL from the district court for Cuming county:
GUY T. GRAVES, JUDGE. *Affirmed*.

F. Dolezal, for appellants.

A. H. Burnett, contra.

FAWCETT, J.

This case is here for the second time. A complete statement of the issues and review of the evidence may be found in the opinion of HOLCOMB, J., 70 Neb. 5. On the first trial in the district court there was a verdict and judgment for plaintiff. On appeal to this court the judgment was reversed and the case remanded, for the reason that the evidence was not sufficient to sustain any verdict in favor of the plaintiff. On the second trial in the lower court the jury were directed to return a verdict in favor of the defendant, which was done, and judgment rendered thereon, from which judgment this appeal is prosecuted.

It is conceded that the evidence in the record now before us is substantially the same as that which was presented on the former hearing. Appellants' main argument here is that our former decision was wrong. That question was fully discussed and considered on the application for a rehearing of the former decision, and decided adversely to plaintiff's contention. The evidence upon the former hearing seems to have received very full and

Banchor v. Lowe.

careful consideration by the court, and we must decline to further review it.

The judgment of the district court is therefore

AFFIRMED.

**FRANKLIN BANCHOR, APPELLANT, v. CHARLES A. LOWE,
APPELLEE.**

FILED MARCH 20, 1909. No. 15,614.

Pleading: AMENDMENT AFTER DECREE. Plaintiff in his petition to redeem from a tax sale made a clerical mistake by which he described the land as the S. W. $\frac{1}{4}$ instead of the N. W. $\frac{1}{4}$, and at the same time filed a *Rs pendens* correctly describing the land. The mistake was not discovered until after a decree had been entered, which also contained the misdescription. Plaintiff promptly, after discovering the mistake, upon due notice to counsel for defendant, moved the court for leave to amend so as to correct the error. The district court overruled the motion. *Held*, Error. Code, sec. 144.

APPEAL from the district court for Keya Paha county:
JAMES J. HARRINGTON, JUDGE. *Reversed*.

W. C. Brown, for appellant.

H. M. Duval and *C. E. Lear*, *contra*.

FAWCETT, J.

On February 21, 1905, defendant Charles A. Lowe purchased the N. W. $\frac{1}{4}$ of section 14, township 33, range 17, in Keya Paha county, at a judicial tax sale for the taxes of the years 1894 to 1899, inclusive. Plaintiff was the owner of the land. On February 5, 1907, plaintiff filed a petition to redeem from such tax sale, but, by a clerical error, described the land as the S. W. $\frac{1}{4}$ instead of the N. W. $\frac{1}{4}$. Summons was duly served. On March 9, 1907, defendant appeared by Duval & Amspoker, his at-

torneys, and moved to strike the petition, for the reason that it had not been signed and verified, which motion was sustained. Plaintiff thereupon filed what he termed an alias petition, which was duly signed and verified. This petition seems to have been copied from the original, and contains the same clerical mistake. Defendant made no further appearance in the case. On May 7, 1907, plaintiff obtained a decree, which found the amount necessary to redeem, the sum of \$77.86, and decreed redemption upon the payment of that sum into court. The decree contains the same misdescription of the land. Plaintiff's attorney testifies that defendant's attorney was present in court at the time the decree was entered, and assisted in making the computation of the amount necessary to redeem for insertion in the decree. This defendant's attorney denies. After the adjournment of that term of court plaintiff's counsel discovered the error in the description, and on July 11, 1907, filed a motion supported by affidavit for leave to amend the petition so as to correctly describe the land sought to be redeemed. On November 11, 1907, the court entered an order finding that notice of the motion for leave to amend had been served on the defendant on May 7, 1907, and that defendant was present in court by attorneys C. E. Lear and H. M. Duval, and that plaintiff was in court by his attorney W. C. Brown, but, on consideration of the motion, overruled and denied the same. To this order plaintiff duly excepted, and has brought the case here for review.

We think the court erred in not permitting the amendment to be made. Section 144 of the code provides: "The court may, either before or after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleading, process, or proceeding, by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect, or by inserting other allegations material to the case, or, when the amendment does not change substantially the claim or defense, by conforming the pleading

Colfax County v. Butler County.

or proceeding to the facts proved." As early as *Deck v. Smith*, 12 Neb. 393, we held that this section confers upon the court an almost unlimited power of amendment "in furtherance of justice"; and this is still the rule. In this case the record shows that on the same day plaintiff filed his original petition he also filed a *lis pendens*, which correctly described the land. This, together with the fact that no other lands in the county were similarly involved, was sufficient to advise the defendant that plaintiff's action was to redeem from tax sale his land which defendant had purchased. It would be a great injustice, and would violate both the letter and spirit of section 144 of the code, to permit defendant to obtain plaintiff's land for the mere pittance of a tax when plaintiff was making a timely attempt to redeem the same. No injustice would have been done the defendant by permitting the amendment, while a great injustice was done the plaintiff by denying it. It was for just such cases as this that section 144 of the code was adopted.

The judgment of the district court is reversed and remanded, with directions to permit the plaintiff to amend his petition as prayed.

REVERSED.

COLFAX COUNTY, APPELLANT, v. BUTLER COUNTY,
APPELLEE.

FILED MARCH 20, 1909. No. 15,567.

1. **Counties: BRIDGE REPAIRS: LIABILITY.** The county of Colfax served notice upon the county of Butler, in substance, requesting it to join in and to pay one-half of the cost of the repair of a wagon bridge over the Platte river, which request being ignored by Butler county, Colfax county proceeded under a contract to build practically a new bridge costing about \$22,000. *Held*, Butler county not liable to Colfax county for any part of the cost of building such bridge.

Colfax County v. Butler County.

2. ———: ———: NOTICE. A notice served upon a party sought to be charged thereby should fairly state the intention of its author and the scope of the enterprise contemplated by him.

APPEAL from the district court for Butler county:
BENJAMIN F. GOOD, JUDGE. *Affirmed.*

John J. Sullivan, C. J. Phelps and B. F. Farrell, for appellant.

A. V. Thomas, E. C. Strode and L. S. Hastings, contra.

DEAN, J.

This is an appeal from Butler county, wherein the county of Colfax, appellant, hereinafter called plaintiff, brought an action against the county of Butler, appellee, hereinafter called defendant, to recover \$11,050.96, being one-half the cost of building a wagon bridge by plaintiff over the Platte river. At the conclusion of the trial the court directed the jury to return a verdict in favor of the defendant, upon which judgment was rendered, and plaintiff appeals.

The petition, in substance, alleges the continuous and uninterrupted existence ever since 1884 of a public road running north and south through both of said counties, which crosses the Platte river at a point near the city of Schuyler by means of a wooden wagon bridge about one-half mile in length; that on June 6, 1904, the plaintiff's board of commissioners adopted a resolution by its terms reciting the unsafe condition of the bridge and plaintiff's desire to repair it, and that defendant be requested to enter into a joint contract with plaintiff providing for each of the said counties to pay one-half of the expense of such repair; that on August 15, 1904, the plaintiff's county board adopted another resolution similar to the resolution of June 6, but, in addition, reciting that "an emergency exists," and "that the public good requires immediate action," and providing "that a contract, drawn by the

county attorney of said county of Colfax, be entered into with Charles G. Sheeley for the said repairs of said bridge" in the event of the failure of Butler county to join in a contract for said purpose, and also providing "that a copy of this resolution and of said contract be served upon the board of supervisors of said county of Butler," and that said Butler county be requested "to incur and pay one-half the necessary expense of repairing the same in accordance with the terms of said contract"; that on August 16, 1904, as alleged by an amendment of plaintiff's petition, both resolutions were served upon the defendant by delivering certified copies thereof to the chairman of the county board of said defendant county; that on said August 16 a certified copy of the resolution of August 15, 1904, was left with the county clerk of the defendant county; that plaintiff on August 29, 1904, as alleged in said amendment, entered into a contract with Charles G. Sheeley, a bridge builder, "providing for all needful repairs of said bridge; * * * that the cost of said repairs * * * was \$21,705.46."

The defendant's answer denies every allegation of plaintiff's petition except the one alleging the corporate capacity of the parties litigant, and alleges that certain residents of Schuyler entered into a written agreement with plaintiff to pay \$7,000 of the cost of building the bridge in suit, provided the plaintiff would undertake the enterprise, which said agreement was accepted by plaintiff, and in consideration thereof plaintiff contracted for the building of said bridge; that prior to executing said contract and entering upon the work in pursuance thereof no demand was made on defendant by plaintiff to repair said old bridge or to join in such contract; that plaintiff, instead of repairing said bridge, fraudulently constructed a new bridge with the fraudulent purpose of deceiving and misleading defendant and its taxpayers; that the cost of said bridge was exorbitant; that upwards of \$6,000 of the amount sought to be recovered is for the cost of building ice breaks which are no part of the bridge. The plain-

tiff's reply is in the usual form of denial of new matter in the answer.

The action is sought to be maintained under sections 6146, 6147 and 6148, Ann. St. 1907, plaintiff relying more particularly upon the proviso clause of said section 6147, which is as follows: "Provided, that if either of such counties shall refuse to enter into contracts to carry out the provisions of this section, for the repair of any such bridge, it shall be lawful for the other of said counties to enter into such contract for all needful repairs, and recover by suit from the county so in default such proportion of the cost of making such repairs as it ought to pay, not exceeding one-half of the full amount so expended." In the specification of errors relied on, counsel for plaintiff in their brief contend: "(1) That the reconstruction of a bridge which was partly, substantially or wholly destroyed by fire, flood or other casualty is repairs within the meaning of the law imposing upon adjoining counties the duty to repair bridges over streams dividing such counties; (2) that notice by one county to another to join with it in repairing a bridge over a stream between the two counties is sufficient to make the county receiving such notice liable for one-half the expense necessarily incurred in making the bridge safe and passable, even though the work done amounts substantially or wholly to new construction." They concede in their argument the structure in question is practically a new bridge, but contend the work performed by Colfax county was "repairs" within the meaning of the statute.

Counsel for defendant contend that the notice served on the defendant county was so unreasonable as to time of service and so essentially defective in substance as to relieve the defendant of liability. The proof shows the original bridge was built in 1883 by a railroad company without expense to plaintiff or defendant, and that in March, 1903, a large part of it was taken out by a flood, leaving about 800 feet standing in the center of the stream, which was afterwards discovered to be practically

valueless. It also shows that certified copies of the resolutions of June 6 and of August 15, 1904, substantially in form and substance the same as those hereinbefore referred to, "and also a copy of a proposition or contract" between Sheeley and Colfax county, were served on the defendant on August 16, 1904, by the then county attorney of Colfax county; that on August 29, 1904, the contract between plaintiff and Sheeley was entered into in pursuance of said resolutions, and on September 3 the work was commenced on the bridge and completed November 10, 1904. The record does not disclose that the county board of the plaintiff heard officially from, or had any official communication with, the county board of the defendant between the date of the service of the said instruments and the date of entering into said contract, a period of 12 days, at the expiration whereof the plaintiff entered into said above contract involving an expenditure of about \$22,000, one-half of which it was their intention to induce or compel the defendant to assume and pay. "Reasonable time" is defined to be so much time as is necessary, under the circumstances, to do conveniently what the contract or duty requires should be done in a particular case. * * * In determining what is a reasonable time or an unreasonable time, regard is to be had to the * * * facts of the particular case. * * * A reasonable time, when no time is specified, is a question of law, and depends on the subject matter and the situation of the parties." 7 Words & Phrases, 5977.

The plaintiff attempts to prove that a certified copy of the resolution of June 6, 1904, was served on the defendant in the same month by F. C. Egerton, a member of the county board of Colfax county, who went to David City evidently for that purpose, but, to the mind of the court, in this the plaintiff has utterly failed. Had the June 6 resolution been properly served upon defendant by Egerton, it is not probable plaintiff would have again served it on August 16, 1904, which the record clearly discloses was done at the same time that a copy of the

Colfax County v. Butler County.

"emergency" resolution was served on defendant that was passed by the plaintiff's board. Ordinarily county boards, and political corporations generally, speak by the written record, and not by the individuals composing such bodies. The subject matter of the notice and of the contract must be considered in connection with the facts surrounding the case. A notice served upon a party sought to be charged thereby should fairly state the intention of its author and the scope of the enterprise contemplated by him. There should be no room left for doubt or conjecture. In *Dodge County v. Saunders* (County, 77 Neb. 787, this court, in a well-considered opinion, speaking by LETTON, J., says: "The notice served upon Saunders county contained no indication that any new ice breaks were to be constructed, but only provided for 'the needful repair of said bridge to make the same safe for passage.'

* * * It is contended that these ice breaks are not repairs, and that they are not necessary for the purpose of repairing the bridge and making it safe for public travel. Whether this be so or not, it is very clear that their construction is not within the terms of the notice served upon Saunders county. It may well be that the county board of Saunders county was willing to entrust the expenditure of the amount of money necessary for 'the repairing of the bridge and making it safe for passage' to the discretion of the county board of Dodge county, and therefore took no action, but that, if it had been notified that the expenditure of nearly \$800 was contemplated in the building of new ice breaks, it would have appeared at the time and place mentioned in the notice for the purpose of participating in the discussion as to the propriety and advisability of letting a contract for such purpose."

It is shown by the proof that less than \$300 worth of material of the old bridge was used by Colfax county in the construction of the new bridge, and it is fairly inferable from the record that such old material was so used for the purpose of making the work appear to be "a repair

job," rather than new work. On cross-examination upon this point the following appears from the testimony of F. C. Egerton, county commissioner of plaintiff in 1904: "Q. Didn't the county attorney advise you that he wanted you to leave something out of the old bridge in the new bridge so that you make it appear a repair job? A. Yes, sir; he told us that we should use that (what) we could. Q. For the purpose of making it a repair job? A. Yes, sir; we would have to use it to make it a repair job." Robert Z. Drake, called by the plaintiff as an expert witness and experienced bridge builder, on cross-examination testified: "A. Well, I think it would be rather a misuse of the word repair if \$22,800 was new work on a \$23,000 job." He also testifies the ice breaks in suit cost from \$5,500 to \$6,000, and that he would not designate an ice break as part of a bridge. John H. Sparks, a bridge builder of 24 years' experience, called on the part of plaintiff, on cross-examination testified, in substance, that a \$22,000 bridge in which there was used \$279.36 worth of old material was new construction, and that the term "bridge repairing" did not contemplate nor include "ice breaks."

Plaintiff contends for what we believe to be a strained construction of the word "repairs" as used in the statutes under consideration and as related to the facts of the case at bar. The resolution and the contract by their terms use the word "repairs" in the ordinary sense. The contract with Sheeley expressly provides that "whatever portion of said bridge is still standing and in a condition safe for public travel shall be left as it now is, and the portion repaired and built by said first party shall be joined upon and added thereto." It has been shown that plaintiff's board of commissioners deemed it advisable to adopt a resolution reciting that an emergency existed, and that the public good required immediate action on its part looking toward the repair of the bridge. The emergency to which the resolution refers, it seems from the record, was carefully nurtured from March, 1903, when

Carter v. Bankers Life Ins. Co.

a considerable portion of the bridge was taken out by the flood, until midsummer, 1904, when the "emergency" as shown by the resolution was first given official recognition by the county board of plaintiff. An emergency is defined in 15 Cyc. 542, as: "Any event or occasional combination of circumstances which calls for immediate action or remedy; pressing necessity; exigency; a sudden or unexpected happening; an unforeseen occurrence or condition." The Century dictionary thus defines emergency: "A sudden or unexpected happening; an unforeseen occurrence or condition; specifically, a preplexing contingency or complication of circumstances; a sudden or unexpected occasion for action; exigency; pressing necessity."

We have carefully examined the entire record and find no error therein. The judgment of the district court is right, and is in all things

AFFIRMED.

REESE, C. J., not sitting.

GERTRUDE M. CARTER, APPELLEE, v. BANKERS LIFE INSURANCE COMPANY, APPELLANT.

FILED MARCH 20, 1909. No. 15,467.

1. Insurance: ACTION: VENUE. An action against a domestic insurance company may be brought in any county of this state where the cause of action or any part thereof arose, and summons therein may be issued to and served in any other county, although there is but a single defendant to the suit.
2. ———: ———: PARTIES. Where a husband enters into a contract of insurance on his life for the benefit of his wife and dies before the policy of insurance issues, the cause of action on the contract of insurance, or for breach of contract for refusal to issue the policy, if such be the case, vests in the wife for whose benefit the contract was made, and not in the administrator of the deceased husband's estate.

3. ———: **CONTRACT.** Where written application for a twenty-payment life insurance policy is made to a company, one of its provisions being that the application, together with the applicant's statement made to the examining physician and the policy that may be issued, shall be the contract between the applicant and the company, and said application is rejected by the company, which makes a counter proposition to insure the applicant and to issue him a ten-payment policy upon the payment of an additional premium, which proposition is accepted and the additional premium paid, a contract of insurance comes immediately into existence, even though no policy of insurance was then or afterwards issued.
4. ———: **REFUSAL TO ISSUE POLICY; ACTION FOR DAMAGES.** Where an oral contract of insurance has been made and the premium paid, and the company refuses to issue a policy as required by the terms of the contract, an action for damages for such breach of contract may be maintained by the party in whose favor the insurance was effected.
5. ———: **POLICIES: EXECUTION.** Section 15, ch. 52, laws 1903, requiring "all policies and contracts of whatever kind for life insurance" to be signed by the president or vice-president and by the secretary or assistant secretary of such company, applies only to companies formed under the provisions of that act.
6. **Statute of Frauds: CONTRACT OF INSURANCE.** The contract of insurance set out in the plaintiff's petition is not obnoxious to our statute of frauds.

APPEAL from the district court for Valley county:
JAMES R. HANNA, JUDGE. *Affirmed.*

Charles O. Whedon, for appellant.

Clements Bros. and E. J. Clements, contra.

DUFFIE, C.

This action was brought for damages for failure of the defendant to issue a policy of insurance on the life of plaintiff's husband. The plaintiff's amended petition alleges that on May 5, 1905, the plaintiff's husband, Harry E. Carter, made a written application to the defendant for a life insurance policy in the sum of \$1,000 for her benefit, the policy to be a twenty-payment policy; that at said

time he executed to the defendant's agent his promissory note for \$31.10, being the first year's premium, and passed a medical examination which was reduced to writing, and this, together with his application, was submitted to defendant for its consideration; that after due examination and consideration of his application and medical examination, and on May 31, 1905, the defendant informed Carter that it had accepted his application for insurance, and would issue a policy for the benefit of the plaintiff on condition that he would consent to accept a ten instead of a twenty-payment contract, and that the annual premium be increased from \$31.10 to \$48.10; that Carter thereupon consented to said change, and gave the defendant's agent his check for \$17, the additional premium required; that defendant sold the note first given and cashed the check for \$17 and applied the proceeds to its own use. It is further alleged that Carter and the plaintiff at the time of making said contract resided in Valley county; that defendant agreed to deliver its policy in said county; and that the contract was made and to be performed therein; that Carter died July 23, 1905, and defendant failed and refused to deliver to Carter or to the plaintiff said insurance policy to the plaintiff's damage in the sum of \$1,000.

A special appearance was made by the defendant, who moved to quash the summons, which motion was overruled.

The answer to the amended petition contains two grounds of defense: First, that the court had not legally acquired jurisdiction over the defendant company, for the reason that at no time did it maintain in Valley county an office or place of business, nor have therein servants, employees or agents who were engaged in carrying out the business of life insurance for it in said county; that the summons was directed to the sheriff of Lancaster county, Nebraska, and was there served upon the defendant; that no summons in the case was issued to the sheriff of Valley county, and no summons served upon

defendant by the sheriff of Valley county; that the court did not and could not obtain jurisdiction of the defendant by virtue of a summons issued in Valley county to the sheriff of Lancaster county. The second defense admits that the defendant is a domestic life insurance company, and that S. J. and M. G. Medlin were its agents, and admits, also, that Harry E. Carter was plaintiff's husband and made application to the defendant for a policy of insurance for \$1,000, payable on his death to the plaintiff, that he passed a medical examination and submitted the same with his application to the defendant, and further admits that Carter about June 1 offered to accept another form of policy and pay defendant's agent \$17 additional premium therefor, and admits that it never issued or delivered to Carter or to the plaintiff any policy, and that Carter died July 23, 1905. It is further alleged that at the time of making his application, and when he paid the \$17 additional premium, Carter was not in good health, which fact he concealed from the defendant, that his application was not accepted, but was refused July 13, 1905, and that on August 16, 1905, defendant tendered to plaintiff \$48, the amount paid as premium, which the plaintiff refused to accept.

A demurrer to the first defense set out in the answer was sustained by the court, and an exception saved by the defendant. A trial resulted in a verdict and judgment for the plaintiff, and defendant has appealed.

The undisputed facts are that Carter applied for insurance in the sum of \$1,000 for the benefit of his wife, and that his written application and written medical examination were submitted to the proper officers of the defendant company at Lincoln, Nebraska; that in the latter part of May or the first of June an agent of the defendant company informed Carter that his application, which was for a twenty-payment policy, would not be accepted by the company, but, if he would consent to take a ten-payment policy and pay an additional annual premium of \$17 a year, then a policy for \$1,000 would

be issued to him; that Carter accepted this proposition and paid the agent, in addition to his note of \$31.10 which he executed for the company when his application was made, his check for \$17, the required additional premium for a ten-payment policy; that Carter died July 23, 1905, and the defendant has refused to issue any policy. If defendant's agent had authority to close a contract with Carter for insurance on his life and to agree that a ten-payment policy would be issued, then it is quite apparent that an oral contract of insurance was completed when Carter accepted the proposed change and gave his check for the additional premium. The evidence relating to the authority of the agent is amply sufficient to support the finding of the jury that the agent was authorized to make the contract.

Dr. Mitchell, the medical director of the company, testified that Carter's application was turned over to him about May 9, 1905. Either on the 10th or 19th of May the doctor filled out the blank indorsed on the back of said application approving the same. This indorsement of approval and the date thereof are partially erased, so that it is hard to say whether the date of approval is the 10th or 19th of May, and the doctor himself cannot tell which is the proper date. After such approval the president of the company informed S. J. Medlin, the agent who took Carter's application, that the application had been rejected for a twenty-payment policy, but recommended for a ten-payment policy, and asked him if he could secure the change. Medlin told the president that his brother, M. C. Medlin, also an agent of the company, was going to North Loup, and that he would consult with and have him see Carter. This he did, after which M. G. Medlin saw and talked with the secretary of the company, and the secretary told M. G. Medlin that Carter's application for a twenty-payment policy had been rejected, but had been passed for a ten-payment policy, and the secretary instructed Medlin to take the matter up with Carter and induce him to accept of the proposed change. It was

after this, and about the 31st of May, that Medlin saw Carter, who at first refused, but afterwards consented to take a ten-payment policy, which it was agreed should be delivered to him at North Loup, in Valley county. Medlin further testified that, after securing the change, he informed Mr. Harley, the secretary, of what he had done. Mr. Harley denies these conversations, but the question was one for the jury, who accepted the testimony of Mr. Medlin.

The defendant claims that it rejected Carter's application July 12, 1905, and notified him by letter on July 13. The proof offered to show that Carter was notified of the rejection of his application was a letterpress copy-book containing a copy of a letter to Carter of that date. The only witness who testified as to the date of this letter was Mr. Harley, the secretary. The copy-book contained no letters written by Harley, nor does he claim to have written the letter in question. He had no personal knowledge that any such letter was written. The letter was as follows: "Lincoln, Neb., 7-13-05. Harry E. Carter, North Loup, Neb. Dear Sir: We are sorry to inform you that your application has been declined by the medical department. Very truly yours, Bankers Life Insurance Co. M. L." Who wrote the letter or whom the initials "M. L." stood for Mr. Harley could not tell, and no further evidence regarding it was offered. It is also quite significant that the money received on account of his application was not returned in this letter, and no mention made of it, and the evidence is conclusive that no such letter was ever received by Carter or his wife. There can be no question that the evidence amply supports the finding of the jury that Medlin was authorized to insure Carter, and that he did so.

Recurring now to the legal questions involved: First. Did the district court acquire jurisdiction of the defendant? Section 55 of the code provides that an action against a domestic insurance company may be brought in the county where the cause of action or some part

thereof arose, or in the county where any contract or portion of a contract entered into by such insurance company has been violated or is to be performed. And section 65 provides that, where the action is rightly brought in any county, a summons shall be issued to any other county against any one or more of the defendants. The evidence is uncontradicted that the agent agreed with Carter that he would deliver the policy to him or it would be sent to him by mail at North Loup. It was part of the contract, therefore, that delivery should be made in Valley county, and the failure to deliver is the breach for which this action is brought. We have no doubt that under sections 55 and 65 of the code the action was properly brought in Valley county. The fact that Carter died in Buffalo county, while absent from his home, is not material in determining the proper venue of action. That the summons was properly issued and served upon the defendant in Lancaster county is, we think, established by this court in the following cases: *Grand Lodge, A. O. U. W., v. Bartes*, 64 Neb. 800; *Nebraska Mutual Hail Ins. Co. v. Meyers*, 66 Neb. 657.

Defendant contends that, if any contract of insurance was made with Carter, an action against the defendants for a breach thereof went to his personal representative, and not to the plaintiff. As we understand the case, the plaintiff does not claim the right to recover in this action upon any cause of action which her husband may have had against the defendant company. Her position is that the contract entered into between Carter and the company was made for her express benefit, that she was the real party in interest, and that any breach of such contract gave her a personal cause of action against the defendant, the same as though the contract had been made personally. This to us seems the correct view of the case, and under the code she may maintain an action on a contract made for her benefit.

One paragraph of Carter's application for insurance upon which much stress is placed by the defendant is in

the following words: "It is hereby expressly stipulated and agreed that the above application, together with the statement made to the examining physician and the report of the examining physician, and this declaration and the policy that may be issued to me shall be the contract between me and the Bankers Life Insurance Company of Nebraska, and I hereby warrant the same to be full, complete and true, whether written by my own hand or not; this warranty being a condition precedent to and a consideration for the policy which may be issued hereon." As we understand the contention of the defendant, it is this: The application providing that the policy, among other matters, shall constitute the contract of insurance, then no contract for insurance could be completed until the policy itself was issued. The form of the application was prepared by or upon the approval of the general officers of the company. Conditions which these officers could exact they could also waive. It is quite clear from the evidence, and the jury have so found, that both the president and secretary of the defendant company authorized Medlin to contract with Carter for a ten-payment policy and that such contract was made. There is no doubt that under the terms of Carter's application no agent could bind it by a complete agreement of insurance until the application was approved at the home office; but, when the home office rejected that application and made a counter proposition to Carter, then when the counter proposition was accepted by him, a valid contract of insurance came immediately into existence, regardless of whether the policy was then issued or not. In *Born v. Home Ins. Co.*, 120 Ia. 299, it is said: "The agreement that no liability should attach until there was an approval of the application by the defendant cannot, alone, change the situs of the contract, for that meant simply that the company should not be liable until it had approved the contract made by its local agent; and when it disapproved it in part, and made a counter proposi-

tion, which was accepted by the plaintiff, it would be idle to contend that it must reaffirm its own act." In this case the company said to its agent: We cannot accept Carter's application for a twenty-payment policy. We will accept his application and insure him for \$1,000 on a ten-payment policy, and we authorize you to see Carter to make him this proposition and to close with him if he accepts it. Making the proposition and its acceptance by the other party, under all authorities, constitutes a valid contract of insurance, unless there be a further stipulation that no contract of insurance shall come into effect until the policy is issued and delivered to the insured.

In *Kimbrow v. New York Life Ins. Co.*, 134 Ia. 84, Kimbro made application through a local agent of the company for a policy on his life of \$2,000 for the benefit of his wife. This application and the medical examination were sent to the New York office. As the result of some inquiry made, the company declined the policy applied for, but filled out and sent to the local agent at Cedar Rapids, Iowa, a policy differing materially in its terms, and providing that, if the applicant died within 16 years, the liability of the company should be \$1,228 only. The agent was directed to deliver this policy, if satisfactory to Kimbro, and he did inform Kimbro that his policy had arrived, and that he would deliver it the next day, but said nothing about the change made. Kimbro died before the policy was delivered. The wife of Kimbro recovered judgment against the company, and the supreme court upon appeal said: "It is true, as already said, that a mere application for insurance cannot be given the effect of a contract; but is a proposal or offer to take insurance, and, if there is any evidence on which the trial court could find as a fact or as conclusion of law that such offer was accepted, then we must treat the applicant as insured upon the terms and conditions of the application. The issuance and manual delivery of a written policy is not ordinarily essential to a contract of insurance." To the same effect is *Preferred Accident Ins. Co.*

v. Stone, 61 Kan. 48, and *Moulton v. Masonic Mutual Benefit Society*, 64 Kan. 56.

In *Fried v. Royal Ins. Co.*, 50 N. Y. 243, an agent of the company took an application on the life of plaintiff's husband. The first premium was paid, and it was agreed that the application should be forwarded to the company's head office in London, and, if accepted, a policy would issue, and, if declined, the premium should be returned. In case the husband died before the decision was received, the sum insured was to be paid. The application was accepted by the London office, and a policy returned to be countersigned by the agent and delivered. The agent refused to deliver, upon the ground of an unfavorable change in the health of the husband, who died soon after. In an action by the wife, it was held: "That the contract and acceptance were unqualified and could not be limited or modified by the private instructions to the agent. That the facts being stated in the complaint, it was immaterial whether the action was to be regarded as one upon the policy, or for damages upon the contract to issue a policy. In either view, plaintiff was entitled to recover the amount insured or agreed to be insured."

In the instant case the facts are all stated in the petition. They are supported by the evidence and constitute an agreement to insure. The failure to issue the policy gave the plaintiff an action for damages to the same extent as though a policy had been issued and action brought thereon. In 1 Wood, Insurance (2d ed.), sec. 11, it is said: "The distinction between a contract of insurance and a contract to insure is that the one is executed, and the other executory, and in the one case the action is upon the contract for the loss or damage sustained under the risk, while, in the other, the action is for a breach of the contract, for not insuring, and the measure of recovery is the loss sustained, so that the effect is the same in either case."

The contention that the trial court erred in admitting the testimony of agent Medlin, and that by so doing the

Carter v. Bankers Life Ins. Co.

terms of a written contract were attempted to be changed and varied by parol testimony, is not well taken. In *Firemen's Ins. Co. v. Kuessner*, 164 Ill. 280, it is said: "Where an application for insurance is presented to a company, stating what is wanted and the terms, and its officer or any agent having authority to issue a policy says one will be issued on that application, the minds of the parties have met in the execution of a contract and a contract for insurance has been consummated. It is an oral contract. Though proposed in writing, the acceptance by parol and a promise to issue a policy thereon constitute an oral contract." And in *Arbuckle v. Smith*, 74 Mich. 568, the court said: "A verbal contract, made on a verbal understanding that it should conform to the terms of a written paper, does not differ from any other verbal contract, and may be shown to have agreed with the writing or differed from it, according to the facts."

So, also, the objection that the contract is obnoxious to our statute of frauds is not tenable, as the contract might, and in this case did, actually terminate within one year.

The claim made by the defendant company that our statute requires all contracts to be evidenced by a written policy must also be denied. Chapter 52, laws 1903, applies only to life insurance companies on the mutual, level premium, legal reserve plan.

Our conclusion is that a contract for insurance was legally made between the parties, that this contract was for the express benefit of the plaintiff herein, and that she may maintain an action for damages for failure to issue the policy. We recommend an affirmance of the judgment.

EPPELSON, GOOD and CALKINS, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

ELIZABETH P. SHANNON ET AL., APPELLANTS, v. WILLIAM
O. BARTHOLOMEW ET AL., APPELLEES.

FILED MARCH 20, 1909. No. 15,485.

1. **Eminent Domain: APPRAISEMENT: NOTICE.** A notice to the owners of land sought to be condemned for park purposes stated that the appraisers apointed to view the land and assess the damages would meet at 2 o'clock P. M. on a certain day and commence their view across Nineteenth street from Kountze park, within the corporate limits of the city, and after viewing the property and hearing interested parties would adjourn to room 200, Omaha National Bank building, where the business would be proceeded with until completed. *Held*, That the notice was sufficiently definite and certain as to the time and place of meeting.
2. ———: ———. The Omaha city charter of 1905 provided that, in appropriating lands for park and other purposes, three appraisers should be appointed by the city council, except that, in cases where land of the value of \$50,000 or more was to be taken, five appraisers should be appointed. *Held*, That, as a preliminary step in the appointment of appraisers, the council must exercise its own judgment as to the value of the land to be taken, and, if but three appraisers were appointed and their report showed the land to be of the value of \$50,000 or more, a second appraisal by five appraisers must be had, but that the appraisalment made by the five appraisers would be valid regardless of the value found by them.
3. **Cities: PARK COMMISSIONERS: APPOINTMENT: VALIDITY OF ACTS.** One section of a city charter provides for the appointment of the members of the park board by the judges of the district court of the judicial district in which the city is located. In a case determined by this court it was held that the statute directing the appointment to be made by the district judges was unconstitutional, and that the park board should be appointed by the mayor and city council under another section of the charter. *Held*, That a park board whose members were appointed by the mayor and city council were invested with all powers vested in park boards by the charter, and that it had authority to designate the real estate deemed desirable for park purposes.

APPEAL from the district court for Douglas county:
HOWARD KENNEDY, JUDGE. *Affirmed*.

Richard S. Horton, for appellants.

H. E. Burham and I. J. Dunn, contra.

DUFFIE, C.

Chapter 12a, Comp. St. 1905, contains the charter of metropolitan cities, and section 57 embraces, among others, the following provisions: "It shall be the duty of the mayor and council to take such action as may be necessary for the appropriation of the lands, lots or grounds designated by said park board, the power to appropriate lands, lots or grounds for such purpose being hereby conferred on the mayor and council." Some time previous to the commencement of this action the park board designated certain real estate in the city of Omaha as desirable for park purposes, and the mayor and council, after passing a proper ordinance, appointed William O. Bartholomew, Frank B. Kennard and Martin Dunham as appraisers to view and appraise the value of said real estate. Thereupon the appraisers served written notice upon the plaintiffs herein, as the owners and parties interested in said land, that said appraisers "will, on the 16th day of February, 1906, at the hour of two o'clock in the afternoon, upon the property described in said ordinance to begin across Nineteenth street from Kountze park, within the corporate limits of said city, meet for the purpose of considering and making the assessment of damages to the owners of the property, and parties interested in the property, respectively, by reason of such taking and appropriation, as declared necessary by said ordinance, which meeting, after viewing the property affected by said appropriation and hearing the parties interested, who may desire to be heard, will be adjourned to room 200, Omaha National Bank building, in said city of Omaha, where the business of the board of appraisers and freeholders will be proceeded with until completed, and for this purpose may adjourn from day to day." The notice

also contained a description of the property to be appraised and appropriated for park purposes. Prior to the meeting of the appraisers the plaintiffs secured a temporary writ enjoining the appraisers, the city of Omaha and its officers from appropriating or taking any steps toward the appropriation of the property; and this injunction upon the final hearing was dissolved and the plaintiffs' bill dismissed. From this judgment the plaintiffs have appealed.

Section 142 of the charter of metropolitan cities makes it the duty of the mayor and council to appoint three disinterested freeholders to assess the damages to the owners of property appropriated by the city for park purposes, and, in case the property sought to be taken is of the value of \$50,000 or more, then five appraisers are to be appointed. The appraisement is to be reported to the city council, and, if the same is confirmed, the damages assessed, if less than \$50,000, shall be paid to the owners of the property. If the assessment is not confirmed by the council, further proceedings may be taken and a new assessment had. Where the property is valued at \$50,000 or more, and the report of the five appraisers is confirmed by the council, the proposition to appropriate the land and pay the damages must be submitted to a vote of the electors of the city at a general or special election.

It is first contended that the property sought to be appropriated is of value of \$80,000, and that three appraisers have no jurisdiction to assess the damages. It is evident that the city council must, in the first instance, as a preliminary step to the appointment of the appraisers, determine the value of the property sought to be taken. If in the judgment of the council the property is of the value of \$50,000 or more, then five appraisers must be appointed. If but three are appointed, and they report the value of the property at \$50,000 or more, it is evident that a second appraisement by five appraisers must be had, and their report upon the value of the prop-

Shannon v. Bartholomew.

erty, whether they place it at \$50,000 or less, would seem to be valid so far as the appraisement is concerned, as there is no prohibition in the charter against accepting the report of five appraisers, even though they fix the value of the property at less than \$50,000. We discover no error in the proceedings of the council in the appointment of but three appraisers; the question of the value of the property being left with the city council in the first instance. That the owners of the property sought to be taken for a public use are entitled to notice and to a hearing by the persons or board appointed to assess their damages is fundamental law.

The second complaint urged by the plaintiffs is that they were denied this right, in that the notice given them was not sufficiently definite as to the place of meeting. The objection is, we think, without merit. The appraisers were to meet at 2 o'clock P. M. on the 16th day of February, 1906, and the meeting was to be on the property and to begin across Nineteenth street from Kountze park. The time of the meeting was definitely fixed, and the place of meeting described with reasonable certainty. Section 55 of the charter provides for the appointment of the park commissioners by the judges of the district court of the judicial district in which the city is situated. A recent decision of this court holds this section of the charter unconstitutional, and that the appointing power rests in the mayor and council under another section of the charter. *State v. Neble*, 82 Neb. 267. The designation of lands in question as desirable for park purposes came from a park board appointed by the mayor and council of the city, and the plaintiffs contend that the charter contemplates that the initial steps to be taken in the appropriation of land for park purposes shall be taken only by a park board appointed by the judges, and that a park board appointed by the mayor and council has no authority in that regard. In other words, it is argued that as the designation of lands desirable for park purposes must come from the park board, and as section 55 provides that

George v. Dill.

the park board shall be appointed by the judges of the district court, a park board appointed by the mayor and council has no power to select and designate such lands, and the city no power to initiate steps for their condemnation. We do not think that the charter should receive so narrow a construction. In the case of *State v. Neble, supra*, we held that under another provision of the charter the mayor and council were authorized to appoint the members of the park board. It was the undoubted intention of the legislature that the members of that board should be selected and appointed by legal authority, and that, when so appointed, it should exercise every duty devolving on it by the charter. If, as seems to be the case, the legislature endeavored to place the appointing power in the judges of the district court and exceeded its constitutional power in so doing, but by another section of the charter granted full power, as it might, to the mayor and council to make such appointments, the park board appointed by the mayor and council is the legal board, and its proceedings, when acting within the power conferred by the charter, cannot be questioned.

We recommend an affirmance of the judgment.

EPPELSON, GOOD and CALKINS, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

WALTER A. GEORGE, APPELLANT, V. EMMA DILL ET AL.,
APPELLEES.

FILED MARCH 20, 1909. No. 15,568.

1. Judgment: VALIDITY: QUERE. In an action pending in the Twelfth judicial district the parties stipulated to try the case before the judge of the Thirteenth judicial district, and to take the evidence before said judge, at Grand Island, in the Eleventh judicial district, during the vacation of the court in which the action

George v. Dill.

was pending. Whether a judgment based on the evidence so taken rendered by the judge hearing it at a regular term of the court of the Twelfth judicial district is erroneous and subject to reversal on appeal, *quære*.

2. —: COLLATERAL ATTACK. After acquiring jurisdiction of the parties and the subject matter of the action, irregularities on the part of the court in entering judgment in the case can be taken advantage of only by appeal; such judgment not being absolutely void and subject to collateral attack.

APPEAL from the district court for Custer county:
BRUNO O. HOSTETLER, JUDGE. *Affirmed*.

Sullivan & Squires and R. A. Moore, for appellant.

John N. Dryden, contra.

DUFFIE, C.

In January, 1902, the plaintiff, Emma Dill, commenced an action in the district court for Custer county against the defendant, Walter A. George. After issue joined, the parties stipulated that the case should be tried before Judge Grimes, judge of the Thirteenth judicial district, at Grand Island. Custer county is in the Twelfth judicial district, and Grand Island is in the Eleventh judicial district. The parties appeared before Judge Grimes at Grand Island, and during a vacation of the district court for Custer county the evidence was heard, arguments made, and the case taken under advisement by the judge. In November, 1904, Judge Grimes made his findings in the case, and drew up a journal entry which he sent to the clerk of the district court for Custer county to be entered of record. His findings and judgment were in favor of the plaintiff, who thereafter caused an execution to issue, whereupon Dill commenced proceedings in the district court for Custer county to enjoin the plaintiff and the sheriff having the execution in charge from enforcing said judgment upon the ground that the same was absolutely void. The injunction proceedings so brought were heard at a regular term of the court for Custer county, Judge

Grimes presiding at the trial upon the request of the judge of the Twelfth judicial district. A finding was made in said cause as follows: "Said judgment having been actually written outside of the judicial district in which said cause was pending, that the court had no jurisdiction by virtue of the stipulation as aforesaid to render judgment in said cause, and that the same is null and void; * * * that the injunction heretofore granted be and the same is hereby made perpetual." After entering a decree and vacating the judgment and enjoining its execution, the court, Judge Grimes still presiding, entered judgment in favor of the plaintiff in the case of *Dill v. George*. The journal entry recited that defendant filed a motion for a new trial, which was overruled, and to which defendant excepted. This occurred on the 17th of November, 1905. On the 19th of August, 1907, the district court for Custer county modified the judgment entry made by Judge Grimes in the case of *Dill v. George* to show that the defendant took no exceptions to the judgment entered, and that no motion was filed by the defendant for a new trial in said cause, and that a statement made in the judgment entry that the case came on for hearing upon the "evidence heretofore taken" referred to the evidence taken before Judge Grimes at Grand Island, in Hall county, in January, 1904.

In May, 1906, this action was commenced to enjoin the levy and collection of another execution procured by Mrs. Dill upon the judgment rendered November 17, 1905, and to have said judgment declared null and void upon the grounds that it was based upon the evidence taken in vacation and outside the judicial district in Hall county; that the case had not been called for trial, evidence taken, or parties heard at the time said judgment was entered; that neither defendant nor his attorneys had any knowledge that said case was to be tried or any steps taken therein; and that they had no knowledge of the entry of said judgment until after Judge Grimes left the bench. Upon the hearing the plaintiff's petition was dismissed,

George v. Dill.

and judgment entered against him for costs of the action, and he has appealed to this court.

That the trial of a case cannot be had outside the county or at any place in the county except at the place designated by law was settled by the opinion in *Shold v. Van Treeck*, 82 Neb. 99. That judgment in a case cannot be entered in vacation has been settled by numerous decisions in this and other courts. Such judgments are absolutely void. In the instant case the right of the plaintiff to an injunction against the enforcement of the judgment depends upon whether the judgment is voidable or absolutely void. If erroneous and voidable only, the remedy of the defendant to have the error corrected was by appeal to this court. If void and of no force or effect, he had no need to proceed against it until some of his rights were threatened in an attempt to enforce it. The testimony of Judge Grimes relating to his action in the matter is as follows: "At some time previous to November, 1905, I had heard a case, *Emma Dill v. Walter A. George*, and there was some question as to the legality of the judgment rendered because the same was prepared elsewhere than in Broken Bow, and in open court and at the request of Judge B. O. Hostettler, the judge of the district court in and for Custer county, I went to Broken Bow during the month of November, 1905, and handed down my decision and rendered the judgment in said case of *Dill v. George*. If I remember correctly, there was also pending at that time an action entitled *George v. Dill*, which action I heard and disposed of at that term of court, Judge Hostettler then being present and holding a regular term of the district court in and for Custer county, at Broken Bow, Nebraska. Q. You may state who was present in the court room at Broken Bow of counsel for the parties plaintiff and defendant when the cases of *George v. Dill* and *Dill v. George* were tried by you as you have narrated? A. John M. Dryden was present representing Emma Dill as her attorney. Homer M. Sullivan, who represented Mr. George in the trial of the case, was

present, and when the two cases, *George v. Dill* and *Dill v. George*, came on for hearing, I remember distinctly asking Mr. Sullivan what action, if any, he desired to take further in said two causes, and his reply, as I now remember it, was that he did not desire to take any action or further steps than had already been taken." It conclusively appears that no evidence in the case of *Dill v. George* was heard by the court at Broken Bow at the time the judgment in question was rendered, and the amended journal entry shows that the evidence referred to in the journal entry was that taken at Grand Island, in the Eleventh judicial district.

Whether a court may pronounce a valid judgment based upon the evidence taken before the judge in the vacation of the court and in another judicial district by agreement of the parties is a question which we do not think it necessary to decide. That such a proceeding taken under objections made by one of the parties would render the judgment erroneous has been held by the supreme court of Iowa. *Funk v. Carroll County*, 96 Ia. 158. The difference between a judgment which is absolutely void and a judgment which is voidable because of some erroneous proceeding leading up to its entry is radical and far reaching. A void judgment may be disregarded until it interferes with the rights of the parties against whom entered, while an erroneous or voidable judgment must be attacked and reversed in the manner provided by law, and, if this be not done, its validity cannot be otherwise questioned. The court having jurisdiction of the subject matter and of the parties has jurisdiction to enter a judgment in the case. That the judgment is not warranted by the evidence does not affect its validity, except upon proper steps taken to have it set aside. Indeed, the courts have gone so far as to say that a judgment entered in the absence of any evidence is valid and binding until set aside by some regular proceeding. In *Clark v. Superior Court*, 55 Cal. 199, it is said: "If, after acquiring jurisdiction of the parties and the subject matter, a superior court should

George v. Dill.

order judgment for one of the parties without a trial, such judgment would not be 'without or in excess of the jurisdiction' of the court, although it might be erroneous; and in such case the only remedy would be by appeal." The facts in that case are somewhat akin to the case at bar. One Murdock had sued Clark in the district court for Lassen county, California. The case was tried before the court without a jury. The court took the case under advisement, and on the 24th of November the term was adjourned. Afterwards the judge made and signed written findings and a judgment in favor of the plaintiff in the action, and forwarded the judgment and findings to the clerk of the court, with private instructions not to file the judgment until the reporter's fees were paid. The findings and judgment remained in the hands of the clerk without being formally filed until a new constitution went into effect. The new constitution apparently created a new system of courts known as the superior courts, and the judge of that court on the 13th of April, 1880, ordered the clerk "to place said judgment and findings and conclusions of law upon the files and records of said court." In the body of the opinion it is said: "Whatever else may be doubted, there is no room for any doubt as to the fact that the action was one of which the superior court had jurisdiction, and could proceed to try and determine it precisely as it might have done if said action had been originally commenced in that court. The case was transferred to that court, and was at issue. No question is raised as to the court having had jurisdiction of the parties or of the subject of the action. Now, conceding for the purpose of this argument, that the court should have proceeded to try said cause *de novo*, instead of adopting the findings, conclusions, and judgment of the late district court, it must be obvious that the only remedy for that error is an appeal. If, after acquiring jurisdiction of the parties and subject matter of an action, a superior court should order judgment in favor of one of the parties without a trial, that judgment would neither be 'without

nor in excess of the jurisdiction of such tribunal,' although it might be erroneous, as any judgment might be if rendered upon the naked pleadings in a case where the pleadings raised a material issue."

In *Ex parte Bennett*, 44 Cal. 84, the court said: "The hearing of proofs, the argument of counsel—in other words, the trial had, or the absence of any or all of these—neither confer jurisdiction in the first instance, nor take it away after it has once fully attached. Jurisdiction has often been said to be 'the power to hear and determine.' It is in truth the power to do both or either—to hear without determining, or to determine without hearing." In *Garner v. State*, 28 Kan. 790, the second paragraph of the syllabus is in the following words: "Where a court of record, having jurisdiction, renders a judgment upon a petition filed before it against a defendant upon default of answer, and the statute requires the court in the particular proceeding to take evidence, and make special findings, and the court fails to comply with the statutory requirements, the judgment at most is erroneous, not void." Many cases of like import are cited in *Van Fleet, Collateral Attack*, secs. 696, 697.

It is true that in *First Nat. Bank v. Sutton Mercantile Co.*, 77 Neb. 596, we held that, "where there is an answer on file setting up a valid defense, the fact that the defendant fails to appear either in person or by attorney when a cause is reached for trial does not entitle the plaintiff to a judgment without proof of the facts constituting his cause of action, unless the facts admitted by the answer make out a *prima facie* case in his favor." This is undoubted law, and its application to the facts in this case would entitle the plaintiff herein to have the judgment against him reversed, had he taken proper steps to that end. While a judgment rendered under such circumstances is erroneous, we have never yet held that it was absolutely void, nor do we know of any rule of law making it so. As long as the court has jurisdiction of the parties and the subject matter of the action, it has

Cooper Wagon and Buggy Co. v. Irvin.

jurisdiction to pronounce an erroneous judgment equally with one that is free from fault. Another matter which must be taken into consideration is that the record in this case does not contain the pleadings in the case of *Dill v. George*, in which the judgment sought to be enjoined was entered. It may be that the court was justified in entering a judgment upon the pleadings alone, in the absence of evidence, or that he construed the pleadings as requiring such action to be taken. If such were the case, it would be entirely immaterial where the evidence taken in the case was heard, and, if an error of the court in construing the pleadings gives the plaintiff in this action greater relief than they justified, this would not invalidate the judgment entered, nor render it subject to an attack in the manner attempted. A careful consideration of the case brings us to the conclusion that, in any aspect in which it may be viewed, the judgment sought to be enjoined is not absolutely void, but erroneous only, and not subject to collateral attack.

We recommend that the judgment of the district court be affirmed.

EPPELSON, GOOD and CALKINS, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

COOPER WAGON AND BUGGY COMPANY, APPELLANT, v. JOHN W. IRVIN ET AL., APPELLEES.

FILED MARCH 20, 1909. No. 15,584.

Mortgages: FORECLOSURE: MARSHALING SECURITIES. The husband and wife mortgaged their homestead owned by the wife, together with other lots owned by the husband, to C. Afterwards they executed a second mortgage to the appellant on the lots owned by the husband. *Held*, That on a foreclosure of these mortgages a decree requiring C. to exhaust the property not embraced in

Cooper Wagon and Buggy Co. v. Irvin.

the homestead before selling the homestead estate was proper, and that the appellant had no cause of complaint, as a marshaling of securities is allowable only where the common debtor of two or more creditors is the owner of the several funds out of which payment is to be made.

APPEAL from the district court for Franklin county:
ED L. ADAMS, JUDGE. *Affirmed.*

Dorsey & McGrew, for appellant.

Albert R. Peck and H. W. Short, contra.

DUFFIE, C.

John W. Irvin and his wife, Ida, made a mortgage to the defendant Cummings covering their homestead, to which the wife held the legal title, and certain other lots in the village of Franklin, the fee title to which was owned by the husband. Afterwards Irvin and wife made to the Cooper Wagon & Buggy Company a second mortgage which covered only the lots owned by the husband. It will thus be seen that the first mortgage to Cummings covered the homestead of the Irvins, together with other real estate, while the second mortgage covered the real estate not included in the homestead. On foreclosure of these mortgages, the district court entered a decree giving Cummings the first lien upon the property covered by his mortgage, but directing that the lots other than the homestead property be first sold, and the surplus, if any, paid to the appellant on its lien. The Cooper Wagon & Buggy Company appeals from this decree, and insists that it is erroneous in not providing for a sale of all the property covered by Cummings' mortgage, which would, of course, leave a greater surplus to be applied in discharge of its lien. The appellees insist that the homestead right of the defendants Irvin is superior to the claim of the appellant, and that their homestead should not be sold unless necessary to satisfy the mortgage lien of Cummings.

The question presented was before this court in a slightly different form in *McCreery v. Schaffer*, 26 Neb. 173. The facts in that case and the law applicable are fully stated in the second paragraph of the syllabus, which is as follows: "If the husband and wife own a tract of land, a part of which is claimed as a homestead, and both execute a mortgage on the whole tract to secure a debt, and the husband afterwards executes a mortgage upon the part not covered by the homestead, to secure his debt, and judgments are rendered or filed in the district court against the husband, and the first mortgagee forecloses, making the other mortgagees and judgment creditors parties, the second mortgagees and judgment creditors cannot insist that the homestead be sold; and the decree will direct the part not covered by the homestead to be first sold, and, if the proceeds satisfy the first mortgage, that the homestead be reserved from sale. The second mortgagees and judgment creditors must rely on the surplus, if any, arising from the sale of the part not exempt from execution as a homestead."

If, where the title to all the mortgaged estate stands in the name of the husband, who is the sole debtor, a marshaling of securities will not be ordered in favor of a creditor who has a lien only upon that part of the mortgaged land not embraced in the homestead, the equities of the homestead claimant are much stronger where the title to the homestead stands in the wife, against whom the second mortgagee has no claim. In such a case it is probable that no marshaling of securities would be ordered or allowed by the court, regardless of the homestead character of part of the security, as it is a well-understood rule that a marshaling of securities cannot be claimed, except where both funds are in the hands of the common debtor of both creditors *Lee v. Gregory & Perry*, 12 Neb. 282; *Citizens State Bank v. Iddings*, 60 Neb. 709. In the case we are considering the property which the appellant insists shall be sold is owned by the wife, while the debt secured by his mortgage is the debt of the

Hinton v. Atchison & N. R. Co.

husband. The husband is not the owner of both tracts, and under the rule most favorable to the appellant a marshaling of securities could not be ordered.

The decree of the district court was the proper one to enter in the case, and we recommend its affirmance.

EPPELSON, GOOD and CALKINS, CC., concur.

By the Court: For the reasons stated in the foregoing opinion, the judgment of the district court is

AFFIRMED.

LYDIA E. HINTON, ADMINISTRATRIX, APPELLEE, v. ATCHISON & NEBRASKA RAILROAD COMPANY ET AL., APPELLANTS.

FILED MARCH 20, 1909. No. 15,405.

1. Appeal: CHANGE OF VENUE: REVIEW. Unless an abuse of discretion is shown, this court will not disturb the ruling of the lower court upon a motion for a change of venue.
2. ———: CHALLENGE OF JUROR: REVIEW. Error will not be attributed to the trial court in overruling the challenge of a juror for cause unless an abuse of discretion is shown.
3. Waters: OBSTRUCTIONS: ACTION FOR DAMAGES: EVIDENCE. In an action to recover damages for the negligent damming back of flood waters, evidence is admissible tending to show that the floods were not unprecedented, and that former excessive rain-falls did not deluge the land in controversy except when the waters were interfered with by an embankment similar to that complained of.
4. ———: ———: ———: ———. Evidence that in another part of the valley in which plaintiff's property was destroyed, but at a place where no embankment interfered, property similar to plaintiff's was destroyed by flood waters was properly excluded, in the absence of evidence or an offer to prove that the rainfall was substantially equal in both places and other natural influences were the same.
5. Trial: INSTRUCTIONS. An instruction which assumes to determine the issues of the case is held not to be erroneous because it excluded certain defenses which were not supported by the evidence, or which have been covered by other instructions given.

Hinton v. Atchison & N. R. Co.

6. **Waters: RAILROAD EMBANKMENT: NEGLIGENCE: EVIDENCE.** In the construction of an embankment or roadbed across the valley of a watercourse, a railway company is required to build sufficient bridges or culverts to permit the passage of such flood waters as might reasonably be expected, and proof of its failure in this regard is proof of negligence in the construction of the roadbed of which an upper landowner may complain.

APPEAL from the district court for Richardson county:
WILLIAM H. KELLIGAR, JUDGE. *Affirmed.*

J. E. Kelby, Byron Clark and Frank E. Bishop, for appellants.

Reavis & Reavis, contra.

EPPELSON, C.

The plaintiff, as administratrix, sues to recover for damages to her decedent's crops, icehouses and ice in the years 1902 and 1903, alleged to have been caused by the illegal act of the defendants in the construction of their roadbed or embankment across the valley of the Nemaha river, whereby flood waters were held back upon the premises in controversy.

The defendants filed a motion for a change of venue, alleging that a fair and impartial trial could not be had in Richardson county because of the prejudice of the citizens, and a desire to have defendants defeated in damage suits that they might be induced thereby to assist in forming drainage districts. This motion was supported by the affidavits of the defendants' attorneys, who stated substantially that all the citizens of said county are more or less interested either through ownership of land or that of their friends and relatives, and that their social, geographical and political associations and interests all combined against the railroad companies in said county; that affiants have often heard and have become familiar with the prevalent argument of the people advanced for the purpose of inducing the railroad com-

panies to consent to be included in the drainage districts, and it has been constantly urged that the company would thereby escape the numerous actions at law for the recovery of damages on account of flood waters; that, in furtherance of said purpose, the people of the county seem to be interested in having large verdicts for damage in the trial of causes against the railroad companies. Counter affidavits were filed, in substance, that affiants believed defendants could receive a fair and impartial trial, and that the question of establishing drainage districts did not affect the defendant's chance for a fair trial. We do not believe that the trial court abused his discretion in overruling the defendants' motion. The statement that all the people of the county were prejudiced was probably the conclusion of affiants. In a general statement as broad as this the sources of information should be stated, showing that the conclusion is well founded.

The defendants challenged three jurors for cause, two of whom, as shown by their *voir dire*, knew nothing about the premises in controversy, nor the cause of the damages done to the property, but who testified substantially that they had an opinion that an embankment placed across the valley would operate to stop the usual course of flood waters. The statements of another juror, Mr. Sullivan, were somewhat contradictory. He knew the premises in controversy and knew the location of the railroad embankment. He was asked if he had any opinion concerning defendants' liability, or whether they in any way caused the damage, to which he answered: "I have no information whether they caused it or not. I have an opinion that way. Q. You have an opinion on whether they caused it or not? A. Yes, sir. Q. And whether they are liable for it or not will depend on what the court told you the law is? A. Certainly." He said, moreover, that his opinion would not affect his judgment in weighing the evidence in the case. It has been decided that the retention or rejection of a juror is a matter of discretion

Hinton v. Atchison & N. R. Co.

for the trial court. *Omaha S. R. Co. v. Beeson*, 36 Neb. 361; *Foley v. State*, 42 Neb. 233; *State v. Bartley*, 56 Neb. 810. The *voir dire* examination of this juror does not clearly indicate that he was incompetent, and we cannot say that the trial court abused his discretion.

The plaintiff's decedent's land was on the north bank of the Nemaha river. Below this the defendants' grade or embankment of earth runs through the valley, crossing the river at a point about $2\frac{1}{2}$ miles east over a bridge 61 feet long. West of the bridge there is a culvert of 18 feet, and there are smaller openings of only a few feet. In each of the years in controversy there were heavy rains, and water stood upon the premises in controversy, destroying certain crops, icehouses and ice belonging to the plaintiff's decedent. Plaintiff recovered a judgment in the district court, from which the defendants have appealed.

Plaintiff's principal witness was permitted to testify, over objection, of former floods and the effect they had upon the land in controversy, and the influence upon flood waters and upon the land of the Missouri Pacific Railway embankment which formerly traversed the valley, and which was similar to the defendants' embankment. This evidence we consider proper. Its tendency was to show that the high waters in the years in controversy were not unprecedented, and, moreover, showed that former rainfalls did not deluge the land in controversy except at times when there was an embankment across the valley similar to that now maintained by the defendants. This witness was also permitted to state that a certain public roadway and dike had no tendency to cause the flood waters to stand upon the plaintiff's land. This may have been the conclusion of the witness, and, technically, was incompetent. We are unable, however, to see wherein it was prejudicial. The same may be said of other evidence wherein the witness gave his estimate as to the height of the defendants' embankment. This was not prejudicial, as his guess did not differ materially from

the testimony of one of defendants' witnesses given with apparent accuracy.

A witness called by the defendant was not permitted to testify that up the valley of the Nemaha, along the south fork wherein no railway had been constructed, the flood waters of 1902 and 1903 destroyed property similar to plaintiff's. We believe that such evidence would have been competent, and would probably have been admitted by the trial court had a sufficient foundation therefor been laid, by showing that the rainfall up the valley was substantially equal to the rainfall upon or affecting the plaintiff's land and that the natural influences were the same. For aught that appears in the record, the plaintiff's property might have been immune from the ravages of the flood, but for defendants' embankment, while that of the witness would have been destroyed.

The court, at plaintiff's request, gave a certain instruction objected to by the defendants. In effect this instruction told the jury that if they believed from the evidence that the flood waters of the river were obstructed by the defendants' embankment, and thereby backed upon the lands of the plaintiff and held there for a longer period than they otherwise would have been held, and plaintiff's decedent suffered damages because thereof, then the verdict should be for the plaintiff for such damage as they may believe from the evidence she has suffered, not exceeding the amount claimed in the petition. Complaint is made that by this instruction the court assumed to determine all the issues of the case, but that certain material issues were omitted. It is argued that there was error in omitting to present one defense pleaded by the defendants, that the rains which produced the flood waters were so unprecedented as to amount to an act of God. The only evidence in the record which tends to support this defense is the testimony of one of plaintiff's witnesses, who testified that the water was higher in 1903 than in any previous year since 1883. The other evidence regarding excessive rainfall indicates that the damages might

Hinton v. Atchison & N. R. Co.

have been caused by the rain had not defendants' embankment been constructed. But this feature of the case was properly submitted to the jury by instructions which defendants requested.

- Defendants also argue that the court should have submitted to the jury the question of defendants' negligence or right to construct and maintain the grade as it did. We find it somewhat difficult to comprehend defendants' reason in presenting this argument. That question was the very one to be determined by the jury, it is true; but the ascertainment of the defendants' right to maintain the grade as it was must be arrived at by a consideration of the evidence and by certain rules which govern. The law required the defendants in the construction of their railway embankment to build bridges or culverts sufficient to permit the passage of such flood waters as might reasonably be expected, and proof of their failure in this respect is proof of the negligent construction of their embankment so far as it affects the rights of upper landowners.

Complaint is further made that the instructions failed to submit the questions of the statute of limitations, of estoppel, the rule regarding the measure of damages, and that it failed to give the essential doctrine of proximate cause. We will not discuss these questions in detail. They were either sufficiently covered by other instructions given by the court or the defendants' theory relative thereto had no support in the evidence. It is very apparent that the damages here in controversy were either caused alone by the flood waters or by the combined influence of the flood waters and the defendants' embankment. These questions were submitted to the jury.

This case is rendered unusually difficult by the admission of scientific evidence reflected in part by an exhibit in the form of a blue print, in which it is represented that the plaintiff's land is at a greater elevation than the defendants' embankment, thereby making it appear impossible for the grade to hold the water back upon the land.

In re Estate of Jones.

We have endeavored to reconcile this evidence with the verdict, but, not being able to overrule or modify the laws of nature, we have reached the conclusion that the jury considered that the scientist who prepared the map, but who did not testify, was probably mistaken in marking the elevations, numerous witnesses having testified that the water did in fact stand three feet in depth upon the plaintiff's land.

We find no reversible error, and recommend that the judgment of the district court be affirmed.

DUFFIE and GOOD, CC., concur.

By the Court: For the reasons given in the foregoing opinion, the judgment of the district court is

AFFIRMED.

ROOT, J., not sitting.

IN RE ESTATE OF SAPHRONIA JONES.

IDA M. LIVINGSTON, APPELLANT, V. A. G. ELLICK,
ADMINISTRATOR, APPELLEE.

FILED MARCH 20, 1909. No. 15,442.

1. **Appeal: SUPERSEDEAS.** In an appeal from the judgment of a county court in a matter of probate jurisdiction, a bond which is not conditioned as required by the statute is insufficient to supersede the judgment appealed from.
2. ———: **TRIAL DE NOVO.** In the trial of a case in the district court on appeal from the county court, a party may plead and prove any facts arising since the trial in the county court which shows that the adverse party is not entitled to the relief sought.
3. ———: **REVERSAL: RELIEF.** Although appellant may fail to supersede an erroneous judgment, which is later executed, the appellate court should reverse it, and, if it appears equitable and just, the appellant should be permitted to seek restoration.

APPEAL from the district court for Douglas county:
WILLIS G. SEARS, JUDGE. *Reversed in part with directions.*

B. N. Robertson, for appellant.

J. A. C. Kennedy and *A. G. Ellick*, contra.

EPPELSON, C.

The appellee was administrator with the will annexed of the estate of Sophronia Jones, deceased, and made his final report to the county court, showing the full administration of the estate, and asked a decree for the distribution of the residue, and for his discharge as administrator. Notice was duly given of the hearing, and at the time therein fixed the court entered an order of distribution. The appellant was a beneficiary under the will to the extent of \$205.98, but in the order of distribution the county court found that there was due the estate from the appellant the sum of \$1,294 on certain notes, which sum it was ordered should be deducted from her distributive share. One of the notes referred to was given to a bank for \$200, signed by R. L. Livingston and Alfred D. Jones. Jones was surety only, and had paid the note. The other note referred to was for \$340, and was given by R. L. Livingston and Mrs. R. L. Livingston, the appellant herein, to Alfred D. Jones on May 4, 1892. Alfred D. Jones was the husband of Sophronia Jones, who survived him. The notes in controversy came into the possession of the appellee as administrator, and presumably belonged to the estate. In his inventory and in his petition for discharge the notes were referred to as of no value. R. L. Livingston was the husband of the appellant, and is deceased. The administrator made no request that the amount represented by these notes be deducted from the distributive share of the appellant, nor did any of the interested parties make such a request. One of the heirs suggested such an order to the county court, upon which he acted without notice to appellant. The administrator, acting, perhaps, with too much haste, distributed the money as directed by the court, and procured a final or-

der of discharge. A few days later the appellant filed an application with the county court, asking that the order of distribution and of the discharge of the administrator be set aside. She also appealed to the district court from such orders. Upon trial in the district court the appellant introduced evidence showing that the \$340 note was given to Alfred D. Jones in consideration of his having paid as surety the \$200 note, the debt of appellant's husband, and, moreover, was permitted to prove that no consideration passed to her for her signature upon the \$340 note, and that it was not signed with reference to her property, trade or business. It appears, therefore, that the county court erred in requiring the deduction of this indebtedness from the distributive share of the appellant.

But the disposition of this case depends upon another question which demands consideration here. The administrator filed an answer, alleging distribution according to the provisions of the order appealed from, and further alleging that the appeal bond given by the appellant to the county court in the prosecution of her appeal therefrom was insufficient to supersede the judgment. The bond was deficient, in that it was signed by one surety instead of two, and was not conditioned as required by law, in that it provided only for the payment of costs instead of debts, damages and costs as provided by section 4825, Ann. St. 1907. This bond did not supersede the judgment of the county court. *Gillespie v. Morsman*, 2 Neb. (Unof.) 162; *O'Chander v. State*, 46 Neb. 10; *State v. Ramsey*, 50 Neb. 166. For this reason, we are convinced that the appellant cannot now complain that the administrator has distributed the funds under the erroneous order of the county court. This, of course, introduced in the trial an issue which was not before the county court. But it was alleged by way of supplemental pleadings, and set forth conditions or facts arising since the trial in the county court which were sufficient to show that it was impossible now to give the relief to appellant which she seeks. As the order of distribution was not superseded, the administra-

tor was justified in paying out the funds to the distributees, and could have been compelled to do so had he refused. For these reasons, the appellant was not entitled to a personal judgment against the administrator, nor its equivalent in the form of an order of distribution requiring him to pay her the amount she claims.

It is apparent from the record before us that the order of distribution was erroneous, and that appellant was entitled to relief. The other legatees have received the amount which should have been paid to appellant. They were parties to the proceeding in which the estate was settled, and in which the order of distribution complained of was made. They made no appearance in the district court, probably thinking that the administrator would represent them. Notwithstanding the fact that appellant failed to supersede the order of distribution, she was entitled to a reversal and modification of that order. In procuring a reversal she would be entitled to proceed against her colegatees for a restoration of the amount each received, which should have been awarded to her, unless they have a defense, which is not indicated in the case before us. In *State v. Horton*, 70 Neb. 334, it was held: "It is a general rule that, 'upon the reversal of a judgment which has been executed, it is the duty of the court to compel restitution,' but restitution is not, in all cases, a matter of absolute right; it rests in the sound discretion of the court." We think this case is one in which appellant should be permitted to enforce a restoration of her money.

We recommend that the judgment of the district court, so far as it releases the administrator from liability, be affirmed, but otherwise reversed and remanded, with instructions to the court below to enter judgment reversing and modifying the county court's order of distribution, and permitting the appellant, if she so desires, to seek restoration of her money from the other legatees.

DUFFIE, GOOD and CALKINS, CC., concur.

Leach v. Bixby.

By the Court: The judgment of the lower court releasing the administrator is affirmed, but remanded, with instructions to the lower court to reverse and modify the county court's order of distribution, and permit the appellant, if she so desires, to seek restoration of her money from the other legatees.

JUDGMENT ACCORDINGLY.

WILLIE Z. LEACH, APPELLEE, v. JAMES H. BIXBY, APPELLEE;
JESSE C. MCNISH, APPELLANT.

FILED MARCH 20, 1909. No. 15,455.

1. **Appeal: PARTIES.** No one but an interested party may appeal, and one bringing a case to this court for review must show by the record that he is an interested party, and that he has been prejudiced by the judgment appealed from.
2. ———: ———. In order to obtain relief on appeal, an intervener may not assail the sufficiency of plaintiff's petition alleging a cause of action only against the defendant, unless he further shows that the judgment dismissing the intervener's petition was erroneous and prejudicial.

APPEAL from the district court for Hayes county:
LESLIE G. HURD, JUDGE. *Affirmed.*

Starr & Reeder, for appellant.

R. D. Brown, C. A. Ready, Venrick & Green and J. L. White, contra.

EPPERSON, C.

Plaintiff filed a petition in the district court to require the specific performance of a contract for the sale of real estate. The defendant filed an answer, with which we are not concerned. The appellant herein obtained leave of court to intervene, and filed an answer and cross-petition, claiming title by virtue of a deed of conveyance made by

the defendant subsequent to the time that plaintiff claims to have purchased. A trial was had upon the issues presented by all the pleadings, which resulted in the relief prayed for by the plaintiff and a dismissal of the intervenor's cross-petition. The intervenor alone appealed from the judgment of the district court, alleging that the judgment is not supported by the evidence, and assigning as errors the court's failure to sustain intervenor's demurrer to the petition, and the admission of evidence on the part of the plaintiff.

No bill of exceptions has been filed, but the intervenor contends that he is entitled to a review of the pleadings, and a reversal of the judgment of the court below in the event it is found that the petition did not state a cause of action against the defendant. We do not believe, under the circumstances of this case, that it would be right for us to determine the sufficiency of the petition. No one but an interested party may appeal, and one bringing the case to this court for review must show by the record that he is an interested party and that he has been prejudiced by the judgment appealed from. Where a petition is assailed by a party thereto, who is sued as a defendant and against whom affirmative relief is asked, he may question its sufficiency at any time before final judgment. He is *prima facie* an interested party, and, on appeal by such a one, this court would be required to look into the petition for the purpose of ascertaining whether or not it stated a cause of action. But in the case at bar the intervenor does not appear from the record to be an interested party. At most, the record only discloses that he claims to be such by reason of some interest or title which he asserted in his answer and cross-petition. That issue was tried in the court below, and, in the absence of the bill of exceptions, we presume that the judgment of the district court dismissing the intervenor's cross-petition is right. He therefore comes into this court without putting himself in a position to question that part of the judgment dismissing his cause of action. In other

words, he has not brought enough of the record here to show that he was prejudiced by the judgment rendered in favor of plaintiff, which he seeks to reverse. He is not entitled to a reversal of the judgment dismissing his cross-petition simply because plaintiff failed to allege a cause of action against defendant.

It is claimed that the intervener was virtually substituted as a party defendant. The record does not support this contention. The intervener asked leave of court to intervene. It seems that this was an oral request, which was granted. Thereupon he filed a pleading in the form of an answer and cross-petition, in which he asked affirmative relief against the plaintiff and against the defendant. Upon trial on the merits the district court found against the intervener and dismissed the cross-petition. Without doubt intervener had the right in the court below to question the sufficiency of plaintiff's petition by showing that he was interested in the subject matter. Although the record discloses that a demurrer was filed, it does not show that it was ever called to the court's attention and a ruling requested thereon. In order to obtain relief on appeal, an intervener must show, not only that the judgment obtained by plaintiff was wrong, but that it was prejudicial to him.

We recommend that the judgment of the district court be affirmed.

DUFFIE, GOOD and CALKINS, CC., concur.

By the Court: For the reasons given in the foregoing opinion, the judgment of the district court is

AFFIRMED.

REMINGTON TYPEWRITER COMPANY, APPELLEE, v. E. D.
SIMPSON, APPELLANT.

FILED MARCH 20, 1909. No. 15,492.

New Trial: SURPRISE. A party will not be entitled to a new trial for surprise occasioned by his adversary's evidence when he could have procured all available evidence to refute it by procuring a short continuance of the trial, but fails to ask for such continuance.

APPEAL from the district court for Douglas county:
LEE S. ESTELLE, JUDGE. *Affirmed.*

Richard S. Horton, for appellant.

W. W. Dodge and *J. W. Battin*, *contra*.

EPPERSON, C.

The plaintiff, claiming to be the owner of a typewriter, brought an action in replevin against the defendant, a constable, who had seized the same upon an execution against the Omaha Umbrella Manufacturing Company. From a judgment rendered in the justice of the peace court an appeal was taken to the district court, where a trial was had resulting in a directed verdict and judgment for the plaintiff. In both courts the plaintiff's ownership and right to possession were alleged in general terms. The typewriter was found by the defendant in the possession of the judgment debtor. In the justice of the peace court plaintiff introduced evidence for the purpose of proving that the judgment debtor was, prior to seizure, in possession of the property under a written contract for the purchase thereof, which said contract upon its face purported to be a sale by the plaintiff to the judgment debtor conditioned for the return of the property to the plaintiff upon default in the payment of the purchase price. In the district court the plaintiff claimed and introduced evidence to prove that the judg-

ment debtor was in possession of the property under a verbal contract permitting him to examine and use the same with a view of purchasing, if satisfactory; that the judgment debtor never did purchase the property, and that the written instrument above described was a forgery.

In a replevin case the only issue to be determined is the right to the possession of the property, and all that a plaintiff need to allege in setting forth his cause of action is that he is the owner of, or has a special interest in, the property, with the right of possession, and that the property is wrongfully detained by the defendant. He need not set forth the facts upon which he relies, and, for this reason, the plaintiff may on a second trial introduce evidence inconsistent with that relied upon in a former trial, and thereby will not introduce a new or different issue. Therefore the evidence adduced in the district court was competent, as it tended to prove plaintiff's ownership.

Defendant asked for a new trial on the ground of surprise, in that the evidence introduced was in support of a theory contrary to, or at least inconsistent with, that upon which it relied in the justice of the peace court. The defendant's affidavits in support of the motion for a new trial show his surprise; but, as we view it, the showing came too late to be available. The record shows that, after the plaintiff introduced the surprising evidence, defendant moved for a directed verdict, thereby expressing his satisfaction with his defense as made. It appears from the showing later made that defendant could have produced evidence to refute that of the plaintiff had a certain witness, a resident of the place of trial, been present; that such witness was absent, but was expected to return on the afternoon of the day of trial. The record does not disclose that any adjournment of the trial was requested for the purpose of procuring such evidence. This should have been done. Defendant was

Willard v. Key.

not justified in suffering the action to proceed to judgment when, as in this case, he knew that the only available evidence could be, or with reasonable certainty would be, available within a short time.

We recommend that the judgment of the district court be affirmed.

DUFFIE, GOOD and CALKINS, CC., concur.

By the Court: For the reasons given in the foregoing opinion, the judgment of the lower court is

AFFIRMED.

GEORGE WILLARD ET AL., APPELLEES, V. GEORGE KEY,
APPELLANT.

FILED MARCH 20, 1909. No. 15,566.

Principal and Agent: MISREPRESENTATIONS: LIABILITY. If an agent, in the prosecution of his principal's business, misrepresents a material fact, and the person to whom such representation is made, in ignorance of the truth, relies and acts on such statement to his damage, the agent and principal are jointly liable in tort therefor.

APPEAL from the district court for Platte county:
CONRAD HOLLENBECK, JUDGE. *Affirmed.*

Martin & Ayres, for appellant.

John J. Sullivan, A. M. Post and Louis Lightner, contra.

EPPELSON, C.

Plaintiff bought a tract of land of defendant Key, the sale of which was negotiated in part by defendant Carrig as Key's agent. Plaintiff alleged, in substance, that he was induced to purchase by the false and fraudulent statements of defendants that there were 352 acres in the tract, when, in fact, there were but 325 acres; that the

Willard v. Key.

agreed price was \$30 an acre, at which rate plaintiff paid for 352 acres. Plaintiff seeks to recover for the difference in the number of acres received and the 352 acres which the defendants represented he would receive, and which his contract called for. The trial court found that there were 335 acres, and rendered judgment against both defendants for \$510 and interest. Key appeals.

Carrig was served with summons in Platte county, where he resided, and wherein the action was instituted and prosecuted. Key was served with summons in Merrick county, where he resided, and, as one defense, pleaded to the jurisdiction of the court. It appears from the evidence that Carrig did not know how many acres there were, but that he relied upon the information given him by his codefendant, in his negotiation of the sale, when he told plaintiff that there were 352 acres. Appellant contends that Carrig had a right to rely upon the information thus received, and that he is not liable to the plaintiff in any event, and should not have been made a party to this suit, and that the appellant should not be required to litigate this case in Platte county, there being no proper party defendant resident thereof whereby jurisdiction might be obtained over the appellant under the provisions of section 65 of the code. Carrig was made a party and properly served in Platte County, and, if plaintiff was not entitled to recover against him, the judgment against the appellant must be set aside for the want of jurisdiction, without regard to the merits of the case. The question therefore is: Did the ignorance of Carrig as to the number of acres in the tract of land, which he was selling for his codefendant, excuse him from liability to the plaintiff? The evidence shows that he told the plaintiff that there were 352 acres, by a positive statement of the fact, and without communicating to the plaintiff that his only source of information was the appellant. Relying upon this and like statements of the appellant, the plaintiff purchased the land in controversy.

We are of the opinion that Carrig's ignorance of the untruthfulness of his representations does not excuse him from liability. In *Phillips v. Jones*, 12 Neb. 213, it is said: "And if a party, without knowing whether his statements are true or not, makes an assertion as to any particular matter upon which the other party has relied, the party defrauded in a proper case will be entitled to relief." The principle there announced has been adhered to by this court in every case where that question has been before it. It is true that it was held in *Runge v. Brown*, 23 Neb. 817, that, in order to permit a recovery for deceit, there must be established, among other things, "The telling of an untruth, knowing it to be such." This case only partially stated the rule. It was modified in *Foley v. Holtry*, 43 Neb. 133, wherein it is said: "A more accurate statement, in view of the later decisions, would be that the defendant must either know that the representations were false, or else they must be made without knowledge as positive statements of known facts." In *Moore v. Scott*, 47 Neb. 346, it was said: "This court has repudiated the doctrine that, in order to make out a case of deceit, it must be shown that the defendant knew his representations to be false. * * * But in all of these cases it is either expressly stated or necessarily implied that in order to be actionable the representations must have been made as a positive statement of existing facts." It has also been held that, although *scienter* is pleaded, it need not be proved, the allegation being considered as surplusage. *Johnson v. Gulick*, 46 Neb. 817. Appellant seeks to distinguish our former decisions above cited, and points out wherein the nature of each action was different from the case at bar. It appears that in *Johnson v. Gulick*, *supra*, misrepresentation was pleaded in defense, and that *Foley v. Holtry*, *supra*, was an action in equity to rescind a contract obtained by deceit; otherwise we fail to see any distinction between the adjudicated cases cited and this one. They are governed by the same principles. The liability of the parties was created at

the time the contract was entered into, and that liability can be enforced in equity or in law, according to the circumstances of each case. The decisions cited are in point, and we see no reason for deviating from the rule so firmly established. If the deceit was discovered before the performance of the contract, the wronged party could, of course, maintain an action to rescind.

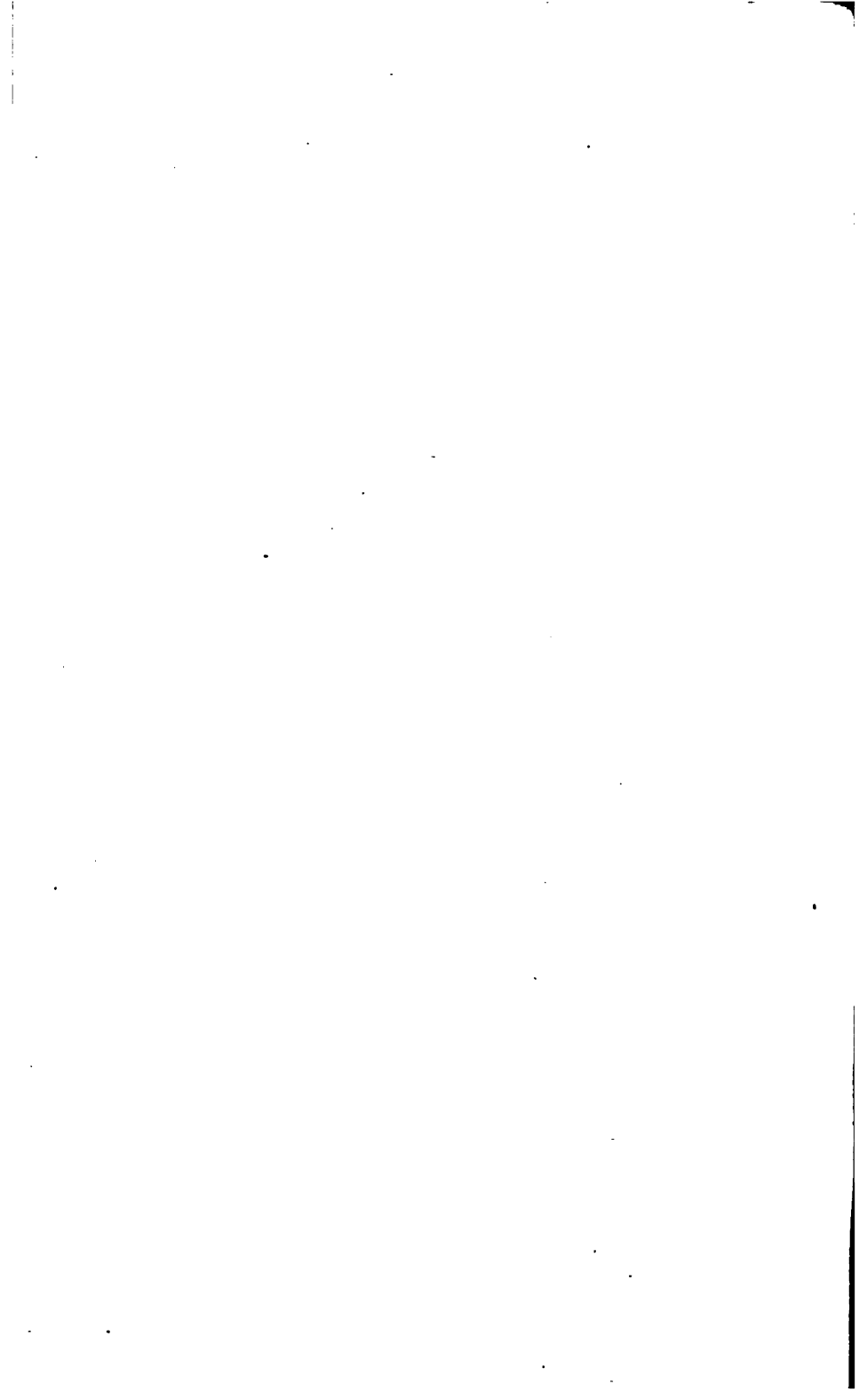
The evidence relied upon by the plaintiff regarding the number of acres establishes that in 1899 there were 335 acres only in the tract. The land is bounded on the west and south by the Loup river. On cross-examination the plaintiff testified that the river at times makes changes by accretion and washing out the land through which it crosses; that it changed its course at times in high water. With reference to this testimony, the appellant contends that the acreage in 1899 cannot be taken as a basis to determine his liability in 1904, the time of the sale. This evidence is hardly sufficient to justify the court in a conclusion that there was a change in the bank of the river along the boundary line of the land in controversy at any time. The surveyor who measured the land in 1899 visited it again in 1906, and testified that then there was less acreage. He did not survey the land in 1906, nor did he examine the entire tract, nor did he testify that there had been any change between 1899 and 1904.

The evidence supported the findings and the judgment of the lower court, and we recommend that it be affirmed.

DUFFIE and GOOD, CC., concur.

By the Court: For the reason given in the foregoing opinion, the judgment of the district court is

AFFIRMED.



INDEX.

Abatement. See **BASTARDY**, 1.

Under sec. 455 of the code, a pending action for libel *held* not to abate by death of the plaintiff. *Shetbley v. Nelson*..... 501

Adverse Possession. See **HIGHWAYS**, 3.

Evidence *held* not to sustain judgment of adverse possession for defendant. *Chicago, R. I. & P. R. Co. v. Erskine*..... 95

Alimony. See **DIVORCE**.

Animals.

In a suit for damages to crops by trespassing animals, defendant may recoup damages resulting from plaintiff's negligence and breach of contract to repair fences, and plaintiff may recover other damages for which defendant is liable. *Meyer v. English* 163

Appeal and Error. See **BASTARDY**. **CRIMINAL LAW. DAMAGES**, 2.

EXECUTORS AND ADMINISTRATORS, 1-3, 9, 14, 17, 22. **TRIAL**.

1. A verdict will not be set aside if sustained by evidence. *Nichols & Shepard Co. v. Steinkraus*..... 1
2. A formal offer to prove is not necessary to a review of a ruling excluding an answer on cross-examination. *Powell v. Morrill* 119
3. A finding on conflicting evidence will not be disturbed. *Heidemann v. Noxon* 175
4. A verdict on conflicting evidence will not be set aside. *Fink v. Busch* 599
5. A third verdict in favor of plaintiff will not be set aside as against the weight of evidence, unless it is clearly insufficient. *Soucek v. Karr* 649
6. Objection to a hypothetical question because an inaccurate statement of the evidence will not be considered on appeal unless the particular defect is pointed out. *Reed v. Village of Syracuse* 713
7. The findings of the district court in a law action tried to the court are entitled to the same weight as the verdict of a jury, and will not be disturbed unless the evidence is clearly insufficient. *Statistics v. Hartford Fire Ins. Co.*..... 768

Appeal and Error—Continued.

8. When the evidence is substantially the same as on a former appeal, its weight must be considered as foreclosed by the former decision. *Hruby v. Sovereign Camp, W. O. W.*..... 800
9. An instruction which could not have been prejudicial will not be reviewed. *Nichols & Shepard Co. v. Steinkraus*..... 1
10. It is reversible error to instruct on an issue not in the pleadings, and unsupported by evidence. *Ord Hardware Co. v. Case Threshing Machine Co.*..... 353
11. Where no exceptions are taken to instructions, if the verdict responds thereto and is supported by evidence, it will not be set aside. *Larsen v. Sanzieri* 384
12. A new trial will not be granted because instructions are confusing and contradictory, where they are favorable to appellant and not misleading. *Smith v. Chicago, B. & Q. R. Co.* 387
13. An instruction to which there is no exception is not reviewable. *Hart v. Chicago & N. W. R. Co.*..... 652
14. Where damages awarded for injury to employee are not excessive, *held* not prejudicial error to instruct that plaintiff can recover for impaired earning capacity. *Reed v. Village of Syracuse* 713
15. An order to retax costs, not excepted to, is final. *Nichols & Shepard Co. v. Steinkraus*..... 1
16. Where appellee's license has expired, and no further rights under it can be claimed, the appeal should be dismissed. *Ververka v. Fullmers* 6
17. Application to amend petition so as to demand interest, made after verdict, and without showing excusing the delay, *held* properly denied. *O'Brien Co. v. Omaha Water Co.*.. 71
18. Where a general verdict is set aside for errors at the trial, a new trial must be awarded upon all the issues. *Cerny v. Paxton & Gallagher Co.*..... 88
19. Indefiniteness *held* not ground for the reversal of a judgment. *Frederick v. Buckminster* 135
20. Certain order of the county court settling the final account of an administrator *held* final and appealable. *Etmund v. Etmund* 151
21. Exception to a ruling is necessary to a review. *Pike v. Hauptman* 172
22. Inadvertently taking the hat worn by plaintiff at the time of the assault sued for to the jury room, *held* without prejudice to defendant. *Morris v. Miller*..... 218
23. Where a judgment is not prejudicial to appellant, the su-

Appeal and Error—Continued.

- preme court will not consider an assignment that the lower court had no jurisdiction of his person. *In re Estate of Buerstetta* 287
24. Where one making request for a jury trial has no defense, and the judgment is the only one which could be rendered, the refusal is error without prejudice. *Worrall Grain Co. v. Johnson* 349
25. Where adopting the construction of parties to a contract leaves recovery a mere matter of computation, the supreme court may require plaintiff to file a remittitur, or submit to a reversal. *Ord Hardware Co. v. Case Threshing Machine Co.* 353
26. Refusal to strike an answer to a question held not prejudicial where the jury could not have been misled. *Boesen v. Omaha Street R. Co.* 378
27. On appeal in a suit against a widow to quiet title, her homestead interest cannot be considered where the record fails to disclose that the land had ever been claimed as a homestead. *Miner v. Morgan* 400
28. The supreme court has jurisdiction on appeal in a liquor license contest. *Rosenberg v. Rohrer* 469
29. Refusal to receive a verdict defective in form, and directing the jury to return one in proper form, held not erroneous. *Keeling v. Pommer* 510
30. If the identity of a cause of action or a defense is preserved, a petition or answer may be amended on appeal to the district court. *Segear v. Westcott* 515
31. Where each party requested a directed verdict, and the court decided the case, plaintiff cannot complain of the court's action. *Segear v. Westcott*..... 515
32. A judgment will not be reversed for erroneous rulings which are not prejudicial. *Kirkpatrick v. Kirkpatrick*..... 578
33. Where the record contains only the pleadings and the judgment, and no error appears, the judgment will be affirmed. *Kirkpatrick v. Kirkpatrick* 578
34. Remarks of court in overruling objection to question held not prejudicial. *Soucek v. Karr* 649
35. Where the court ordered the jury to view the *locus in quo*, and they dined with defendant, and plaintiff did not object or except, held he could not complain after verdict. *Shepherdson v. Clopine* 764
36. A decree will not be reversed for a mere technical error. *Kimmerly v. McMichael* 789

Appeal and Error—Concludea.

37. A bond on appeal from judgment of county court in a probate matter, not conditioned as required by sec. 4825, Ann. St. 1907, *held* not to supersede the judgment. *In re Estate of Jones* 841
38. On a trial in district court on appeal from county court a party may plead and prove facts arising since the trial in county court. *In re Estate of Jones*..... 841
39. Although appellant may fail to supersede an erroneous judgment, which is later executed, the appellate court should reverse it, and, if equitable, "appellant should be permitted to seek restitution. *In re Estate of Jones*..... 841
40. Ruling on a motion for change of venue will not be disturbed where there is no abuse of discretion. *Hinton v. Atchison & N. R. Co.*..... 835
41. Error will not be attributed to the overruling of challenge of a juror for cause unless an abuse of discretion is shown. *Hinton v. Atchison & N. R. Co.* 835
42. Appellant must show by the record that he is an interested party, and that he has been prejudiced by the judgment appealed from. *Leach v. Birby* 845
43. On appeal, an intervener cannot question the sufficiency of plaintiff's petition alleging a cause of action only against the defendant unless he shows that the judgment dismissing his petition was prejudicial. *Leach v. Birby*..... 845

Appearance.

- Stipulation for discharge of garnishee, *held* a general appearance by defendant. *Herpolsheimer v. Acme Harvester Co.* 53

Assault and Battery.

1. Where two persons engage voluntarily in a fight either can sue the other for actual damage. *Morris v. Miller*..... 218
2. In an action for damages for an assault, the admission of plaintiff's hat in evidence *held* not erroneous. *Morris v. Miller* 218
3. Petition *held* to state cause of action for damages for assault and battery. *Fink v. Busch*..... 599
4. Where one enters premises of another for a proper purpose, and the landowner orders him to depart, his failure to do so instantly does not justify the landowner in using a deadly weapon to eject him. *Glassey v. Dye*..... 615
5. In an action for damages for an assault, instruction as to self-defense *held* not erroneous. *Morris v. Miller*..... 218
6. In an action for assault and battery, *held* improper to sub-

Assault and Battery—Concluded.

- mit defense of justification, when such defense is neither alleged nor proved. *Fink v. Busch*..... 599
7. Instruction that if the jury believed that plaintiff before or at the time of the assault used threatening language toward defendant, they might take it into consideration in mitigation of damages, *held* erroneous, there being no evidence to support it. *Glassey v. Dye*..... 615
8. Instruction as to self-defense, *held* erroneous, it not appearing that plaintiff attacked or threatened defendant. *Glassey v. Dye* 615
9. In an action by a married woman for damages for assault and battery, *held* not error to instruct the jury to consider any loss of earning capacity. *Montgomery v. Miller*..... 625

Assignments for Benefit of Creditors.

1. A voluntary assignment for the benefit of creditors is void if the deed of assignment is not witnessed and acknowledged. *Talmage v. Minton-Woodward Co.*..... 29
2. In assignment proceedings under secs. 3500-3545, Ann. St. 1907, if the deed of assignment is void, distribution of the estate and discharge of the assignee *held* not an exhaustion of the property of the assignor. *Talmage v. Minton-Woodward Co.* 29

Attachment.

1. Written assignment of money *held* to give the assignee priority over attaching creditor. *Yetser v. Broadwell*..... 302
2. A prior unrecorded deed *held* to take precedence of an attachment if recorded before any deed based upon the attachment. *Mahoney v. Salisbury* 488
3. Ownership of real estate cannot be adjudicated on a motion to dissolve an attachment. *Mahoney v. Salisbury*..... 488
4. An affidavit for attachment *held* to give a justice jurisdiction of the property seized when followed by the service provided by sec. 932 of the code. *Curtis-Baum Co. v. Lang*.... 728

Attorneys.

- Evidence *held* not to warrant disbarment or suspension. *In re Watson* 211

Banks and Banking.

1. A contract between two creditors of a common debtor, that a debt purchased by one may be preferred by the debtor, *held* not to entitle the purchaser to dividends declared on the claim of the other in subsequent bankruptcy proceedings. *Stires v. First Nat. Bank*..... 193

Banks and Banking—Concluded.

2. In bankruptcy proceedings, dividends paid on a pledged note will be applied on the debt secured. *Stires v. First Nat. Bank* 193

Bastardy.

1. That a warrant for the arrest of the putative father of a bastard is not directed to the sheriff, coroner, or constable is not a cause for abating the action in the district court where the question was not raised before the examining magistrate. *Heidemann v. Noxon* 175
2. The examining magistrate does not lose jurisdiction of a bastardy case by granting a continuance on the request of defendant. *Heidemann v. Noxon*..... 175
3. Where evidence as to his chastity in a bastardy case was improperly introduced by defendant, he cannot predicate error on a proper instruction to disregard it. *Collister v. Ritzhaupt* 794
4. Where the evidence in a bastardy case has been fully submitted, *held* not error to refuse a requested instruction making prominent certain evidence. *Collister v. Ritzhaupt*.... 794
5. In bastardy case, defendant by appearing before a justice and entering into a recognizance to appear before the district court, *held* to waive objection to complaint that it fails to state the child, "if born alive, may be a bastard." *Collister v. Ritzhaupt* 794
6. In bastardy case, defendant by plea of not guilty, without objecting to the complaint, *held* to waive objection. *Collister v. Ritzhaupt* 794

Bills and Notes.

1. Whether defendant, who, being unable to read, was induced to sign a note on the false representation that it was an agreement for the use of a farm gate, was negligent, *held* question for jury. *First State Bank v. Borchers*..... 530
2. That circumstances surrounding the purchase of a note before maturity were sufficient to excite the suspicion of a prudent man will not defeat a recovery. *First State Bank v. Borchers* 530
3. Note of corporation *held* valid in the hands of bona fide purchaser. *Second Nat. Bank v. Snoqualmie Trust Co.*..... 645
4. An indorsee who took a note before maturity in part payment of a preexisting debt, *held* a purchaser for value. *Second Nat. Bank v. Snoqualmie Trust Co.*..... 645
5. Where evidence is conflicting as to whether an indorsee took a note without notice of infirmities, *held* error to direct a verdict. *Gibson v. Gutru* 718

Bills and Notes—Concluded.

6. Certain notes *held* given for accommodation. *Citizens Bank v. Fredrickson* 755
7. It is no defense to an accommodation note, as against an indorsee, that it was without consideration, or that it was understood the payee was to take care of it. *Citizens Bank v. Fredrickson* 755

Bridges. See COUNTIES AND COUNTY OFFICERS.

Brokers.

1. Where a contract for the sale of real estate between the owner and a broker is void because not in writing, as required by sec. 10856, Ann. St. 1907, the broker cannot recover on a *quantum meruit*. *Nelson v. Webster*..... 169
2. As between brokers, *held* that the one whose efforts were the effective cause of the sale is entitled to the commission. *Lewis v. McDonald* 694
3. As between brokers, the efforts of one *held* the effective cause of the sale, entitling him to the commission. *Lewis v. McDonald* 694

Cancellation of Instruments.

- Evidence in suit to cancel deed, *held* to sustain judgment for plaintiff. *Jesse v. Brown* 311

Carriers.

1. Conduct of carrier, *held* an unlawful discrimination against shippers of hay. *State v. Chicago & N. W. R. Co.*..... 518
2. Shipper *held* only entitled to a just division of empty cars that should have been apportioned to the station where he transacted business. *State v. Chicago & N. W. R. Co.*..... 518
3. Ch. 90, laws 1907, *held* not in every instance to afford a shipper an adequate remedy against a carrier's refusal to furnish cars. *State v. Chicago & N. W. R. Co.*..... 524
4. Carrier *held* not liable to shipper for loss of horses. *Quindy v. Union P. R. Co.*..... 777

Chattel Mortgages.

1. Where successive chattel mortgages on a specified number of cattle out of a greater number are given to the same mortgagee and assigned, *held* the second assignee takes subject to a right of selection in the first assignee. *South Omaha Nat. Bank v. McGillin*..... 439
2. Right of selection *held* not affected by the fact that second mortgages were renewals of prior mortgages satisfied of record, or that there was an oral agreement that releases of record should not take effect according to their terms. *South Omaha Nat. Bank v. McGillin*..... 439

Constitutional Law.

1. Only tax proceedings which are arbitrary, oppressive or unjust are not due process of law. *State v. Several Parcels of Land* 13
2. To constitute due process of law it is not necessary that notice be given of each step in the process of taxation, but it is sufficient if the taxpayer has an opportunity to appear at some time. *State v. Several Parcels of Land*..... 13
3. Sec. 3 of the act of March 30, 1901 (laws 1901, ch. 93), relating to extortion, contravenes sec. 15, art III of the constitution, forbidding special legislation, because the acts prohibited are made criminal only when committed against citizens or residents of Nebraska. *Greene v. State*..... 84
4. Courts will listen to an objection to the constitutionality of a law by a party whose rights it does not affect where the vice of the law consists in an unwarranted discrimination between the individuals against whom the aggression thereby forbidden is committed. *Greene v. State*..... 84
5. A statute limiting the dower right of a nonresident widow to lands of which her husband died seized, *held* not inhibited by constitutional provisions relating to due process of law and to distinctions between resident aliens and citizens in the possession, enjoyment or descent of property. *Miner v. Morgan* 400
6. The language of the constitution is to be interpreted with reference to the established laws, usages and customs at the time of its adoption, and the course of ordinary and long-settled proceedings according to law. *In re Hammond*..... 636
7. A party will not ordinarily be permitted to attack the constitutionality of a statute where his rights are not invaded. *State v. Brandt* 656
8. Sec. 5514, Ann. St. 1907, in so far as it assumes to authorize an appeal from the decision of the county board on the question of public utility of a drain, *held* void. *Johannes v. Thayer County* 689

Contempt. See DEPOSITIONS, 2.

Contracts.

1. The meaning of a sentence or part of a written instrument should be ascertained by considering all of the parts of the instrument together. *Teske v. Dittberner*..... 701
2. Instruction in an action for balance due on verbal contract to exchange work, *held* erroneously refused. *Adams v. Fisher* 686
3. Where both parties to a contract fail to perform on the day

Contracts—Concluded.

named, they will be held to have waived performance as to time. *Cadwell v. Smith* 567

4. One party to a contract cannot declare a forfeiture, unless he is in position to perform. *Cadwell v. Smith*..... 567

5. Where parties have adopted a reasonable construction of their contract, courts will adopt such construction. *Ord Hardware Co. v. Case Threshing Machine Co.*..... 353

Costs. See WILLS, 5.

1. In a suit to enjoin the construction of a street railway for failure of defendant to comply with a certain ordinance, held that costs of suit were properly taxed to defendant. *Woods v. Lincoln Traction Co.*..... 23

2. Where separate appeals in an administrator's accounts are filed in the district court, the costs of the several transcripts are properly taxed against the losing party. *Etmund v. Etmund*..... 151

3. Though mandamus to compel carrier to furnish cars was reversed on appeal, costs taxed to carrier. *State v. Chicago & N. W. R. Co.* 518

Counties and County Officers.

1. The words "recovery by suit," in the proviso of sec. 6147, Ann. St. 1907, include a suit instituted by appeal from the disallowance of a claim by a county board. *Cass County v. Sarpy County* 435

2. County surveyor held not within the inhibition of sec. 4469, Ann. St. 1907, and entitled to recover for services to the county. *Pethoud v. Gage County*..... 497

3. A county which refuses to enter into a contract with an adjoining county to repair a bridge across a stream dividing the counties is liable to the county making the repairs. *Buffalo County v. Kearney County*..... 550

4. Where proper steps have been taken to render an adjoining county liable for repair of a bridge, and an issue is raised as to the necessity of the repairs or the amount paid therefor, the amount the defaulting county ought to pay is a question for the jury. *Buffalo County v. Kearney County*.. 550

5. Where traction engine is injured by reason of defective bridge, plaintiff can recover only actual cost of necessary repairs. *Layton v. Sarpy County*..... 628

6. Notice by a county to an adjoining county to join in the repair of a bridge, held not to make the adjoining county liable for any part of the costs of a new bridge. *Colfax County v. Butler County* 803

7. Requisites of notice stated. *Colfax County v. Butler County*, 803

Courts.

Sec. 16, art. VI of the constitution, barring the county court of jurisdiction of actions involving title to real estate, does not apply where title is involved as an incident to a question of which that court has exclusive original jurisdiction. *In re Estate of Buerstetta* 257

Criminal Law. See INDICTMENT AND INFORMATION. INTOXICATING LIQUORS, 14, 15, 17, 18. LARCENY. MONOPOLIES. RAPE. ROBBERY.

1. In a prosecution for homicide while committing a robbery, evidence that decedent had considerable money in his possession, held admissible. *Fouse v. State*..... 253
2. An answer responsive to a question should not be stricken. *Fouse v. State* 256
3. It is within the court's discretion to permit a witness to testify, though he had disobeyed an order excluding witnesses from the court room. *Fouse v. State*..... 258
4. An order refusing defendant permission to amend his motion for a new trial will not be reviewed, where application was made more than three days after verdict. *Fouse v. State* 258
5. A voluntary statement by defendant held properly referred to by the court as a confession. *Fouse v. State*..... 258
6. Where the evidence does not tend to prove that defendant was intoxicated, and defendant claimed he acted in self-defense, the supreme court will not examine an instruction submitting the defense of intoxication. *Fouse v. State*, 255
7. A police officer may testify to statements by defendant while in his custody, where the statements were voluntary. *Fouse v. State* 258
8. It is within the court's discretion to order or refuse to permit the jury to inspect the scene of the crime. *Fouse v. State* 258
9. Exceptions to instructions will not be considered unless specifically assigned in the motion for a new trial. *Poston v. State* 240
10. Defendant will not be permitted to prove matters of defense on cross-examination of state's witness not brought out on direct examination. *Poston v. State* 240
11. On a prosecution under sec. 7170, Ann. St. 1907, making it a crime to keep intoxicating liquor for unlawful sale, certain evidence of state chemist held competent. *Poston v. State* 240
12. Defendant testifying in his own behalf is subject to the

Criminal Law—Continued.

- same rules of cross-examination as any other witness. *Poston v. State* 240
13. It is competent to show the intoxicated condition of persons in defendant's place of business as tending to show that liquor sold was intoxicating. *Poston v. State*..... 240
14. Evidence, in a prosecution for assisting and procuring another to disinter human remains, *held* insufficient to support a conviction. *Callahan v. State*..... 246
15. Evidence *held* not to constitute such instructions to a laborer as to warrant a conviction for procuring another to disinter human remains. *Callahan v. State*..... 246
16. Submitting an issue to the jury, unsupported by evidence, *held* error. *Callahan v. State* 246
17. Failure to appoint an attorney for accused until after plea *held* not error. *Foster v. State*..... 264
18. That a part of the jury were taken by the bailiff to a toilet room, *held* not to justify a new trial. *Foster v. State*..... 264
19. Accused *held* to have waived his right to a copy of the information. *Foster v. State* 264
20. Under the evidence, *held* that conviction for robbery would not be set aside because of defendant's denial corroborated by an alibi sought to be established by relatives. *Lillie v. State* 268
21. Refusal to grant a new trial for reasons set out in an amendment to the motion for a new trial filed more than three days after verdict will not be reviewed. *Lillie v. State*..... 268
22. A new trial for newly discovered evidence *held* properly denied. *Lillie v. State*..... 268
23. The police judge of the city of Lincoln has jurisdiction of violations of rules of the excise board of that city. *State v. Dudgeon* 371
24. The jurisdiction of a police judge under sec. 18, art. VI of the constitution, sec. 260 of the criminal code, and sec. 7943, Ann. St. 1907, in relation to misdemeanors, is concurrent with that of a justice of the peace, and, where the punishment may be a fine over \$100, he can only sit as an examining magistrate. *State v. Dudgeon* 371
25. The right of accused to trial before a jury of the county where the crime was committed is a personal privilege which he waives if the venue is changed at his request. *Kennison v. State* 391
26. Error is not presumed, and a conviction will not be reversed because of alleged error in the selection of a jury

Criminal Law—Concluded.

- where the record does not affirmatively support such assignment. *Kennison v. State* 391
27. Accused *held* not entitled to an instruction on the theory that the killing was accidental. *Kennison v. State*..... 391
28. Instructions *held* to present the law of self-defense. *Kennison v. State* 391
29. Misconduct of counsel *held* not prejudicially erroneous to defendant. *Kennison v. State* 391
30. An order compelling counsel for accused to argue the cause at night *held* not ground for new trial. *Kennison v. State*.. 391
31. Limiting argument in a murder trial *held* not ground for new trial, especially where counsel did not request an extension of time. *Kennison v. State*..... 391
32. The court's threat to discipline a contumacious counsel *held* not ground for new trial. *Kennison v. State*..... 391
33. Instruction, in a prosecution for selling or keeping for sale malt liquor, *held* to submit the question of the intoxicating properties of the liquor, and that its submission was erroneous, but without prejudice, as it was by procurement of accused. *Luther v. State* 455

Damages. See FRAUD, 2.

1. Physical pain and mental anguish need not be specially alleged, where the injury is such as to necessarily import them. *Fink v. Busch* 599
2. In an action for damages to timber by fire, where the trees have a value separate from the land, instruction that the measure of damages is the difference in value of the land before and after the fire, *held* erroneous. *Hart v. Chicago & N. W. R. Co.* 652

Deeds. See ATTACHMENT, 2.

- Proof of an unacknowledged deed made by a subscribing witness, as provided by sec. 10807, Ann. St. 1907, entitles such deed to record, and is presumptive of its due execution. *Wilson v. Wilson* 562

Depositions.

1. Statutes authorizing justices of the peace to take depositions and to punish persons who disobey subpoenas or refuse to answer proper questions are within sec. 18, art. VI of the constitution, providing that justices of the peace shall have such jurisdiction as may be provided by law. *In re Hammond* 636
2. Refusal to answer such improper questions in taking a

Depositions—Concluded.

- deposition as would constitute an abuse of process is not a contempt. *In re Hammond* 636
3. Secs. 966, 967 of the code do not apply to the taking of depositions before a justice, but sec. 356 *et seq.* control. *In re Hammond* 636

Descent and Distribution.

- The district court is without original jurisdiction to distribute the funds of an estate. *In re Estate of Manning*..... 417

Divorce.

- Allowance of alimony in lieu of a wife's interest in her husband's property is not an adjudication which prevents her from canceling a deed executed in violation of her homestead rights and interfering with her lien for alimony. *Kimmerly v. McMichael* 789

Dower. See CONSTITUTIONAL LAW, 5.

1. Evidence *held* to sustain finding that a wife was a non-resident, under the statute limiting the dower right of a nonresident widow to lands of which her husband died seized. *Miner v. Morgan* 400
2. A wife has no dower interest in lands conveyed by her husband while she is a nonresident. *Miner v. Morgan*..... 400

Drains.

1. That part of ch. 153, laws 1907 (Ann. St. 1907, sec. 5598 *et seq.*), which authorizes county commissioners to establish a drainage district so as to include land in an adjoining county, *held* not void. *State v. Fuller* 784
2. Boundaries of drainage districts established under ch. 153, laws 1907, may overlap. *State v. Fuller*..... 784
3. Boundaries of a proposed drainage district may be changed by the county commissioners at any time before rights of third persons have accrued, but, if changed, the three weeks' notice of election must be given. *State v. Fuller*..... 784
4. Where county commissioners change the boundaries of a proposed drainage district, but not the notice of election, a landowner who did not participate in the election may bring *quo warranto* to dissolve the district and oust its directors from office. *State v. Fuller* 784

Easements.

- Answer *held* sufficient. *Frederick v. Buckminster*..... 135

Ejectment.

1. Judgment for defendant *held* not supported by the evidence. *Chicago, R. I. & P. R. Co. v. Latta*..... 104

Ejectment—Concluded.

2. In ejectment, if defendant denies plaintiff's title, he may prove any defense that will defeat the action. *Chicago, R. I. & P. R. Co. v. Welch* 106

Elections.

1. The provisions in sec. 155, 159, art. I, ch. 26, Comp. St. 1907, as to marks on ballots, *held* directory. *Gauvreau v. Van Patten* 64
2. Writing name of person for an office not designated on an official ballot *held* not to avoid the ballot, unless it was done to distinguish it. *Gauvreau v. Van Patten*..... 64
3. The district court *held* without jurisdiction of an original action to contest the nomination of a legislative candidate at a primary election. *Whedon v. Brown*..... 130
4. Change in polling place *held* not to render the election void. *Whitcomb v. Chase*..... 360
5. Where, on appeal to the district court in an election contest, the parties treat a transcript as sufficient and try the case on its merits, the jurisdiction of the district court cannot be questioned for the first time in the supreme court. *Whitcomb v. Chase* 360

Electricity.

- Failure of electric light company to comply with certain ordinances *held* negligence rendering it liable to any person injured by reason thereof. *Olson v. Nebraska Telephone Co.* 735

Eminent Domain.

- Notice to the owners of land condemned for park purposes, *held* sufficiently definite as to time and place of meeting of appraisers. *Shannon v. Bartholomew* 821

Estoppel.

- Where a lessor has accepted the benefits of a lease made to a partnership, he cannot, in a suit for specific performance of a covenant to renew, plead that the partnership was without capacity to take title to real estate. *Gorder & Son v. Pankonin* 204

Evidence. See APPEAL AND ERROR, 1-8. TRIAL.

1. In an action for goods negligently destroyed, evidence of their market value based on the cost, *held* not incompetent, where the cost was less than the market value. *O'Brien Co. v. Omaha Water Co.* 71
2. Testimony at a former trial *held* inadmissible without showing of diligence to secure attendance of witness. *Van-dewege v. Peter* 140

Evidence—Concluded.

3. An attorney who took part in a trial, but is unable to remember the substance of all the evidence of a witness, *held* incompetent to reproduce it. *Vandewege v. Peter*.... 140
4. Evidence of witness at former trial *held* admissible, where timely steps to secure his attendance by compulsory process have been taken. *Pike v. Hauptman* 172
5. An unacknowledged ancient document coming from doubtful custody may be rejected, where a credible witness testifies that obligor's signature is not genuine. *Peterson v. Bauer* 405
6. A letter may be introduced in evidence where it is shown that it was received in due course of mail in reply to a letter mailed to the writer. *Helwig v. Aulabaugh*..... 542
7. Where plaintiff was unable to secure the depositions or presence of witnesses, *held* not error to permit their testimony at a former trial to be read from bill of exceptions. *Souchek v. Karr* 649
8. In an action for damages to timber by fire, a witness may testify to the number of trees destroyed and their value before and after the fire. *Hart v. Chicago & N. W. R. Co.*... 652
9. Where the intentions of an interested witness become a matter for judicial inquiry, they are ascertained by consideration of his conduct, and not by what he declares his intentions were. *Lewis v. McDonald*..... 694

Executors and Administrators.

1. Where objections are interposed in the county court to the allowance of a claim against a decedent's estate, the issues thus framed will be liberally construed in the district court. *Fitch v. Martin* 124
2. The adoption of a report of an administrator and findings thereon in a supplemental report, *held* to carry the whole accounting into the second report, and that an appeal to the district court from an order settling the final report brought up the whole record. *Etmund v. Etmund*..... 151
3. Where a partial transcript on appeal from the county court was filed in the district court within time, *held* not error to allow a portion of a transcript in the same case, formerly filed in the district court, to be made a part thereof. *Etmund v. Etmund* 151
4. The inventory filed by an executrix is not conclusive against her. *In re Estate of Fletcher*..... 156
5. An executrix will not be given credit in her account for money expended for her personal advantage concerning the estate. *In re Estate of Fletcher* 156

Executors and Administrators—Continued.

6. A widow is entitled, under subd. 1, sec. 176, ch. 23, Comp. St. 1905, to the chattels therein specified, and also to \$200 in cash from her husband's estate, and such property is not assets of the estate. *In re Estate of Fletcher*..... 156
7. The maintenance of the widow and minor children of a testator pending settlement of his estate may be charged upon the real estate, if the income therefrom and the personal property be insufficient. *In re Estate of Fletcher*.... 156
8. Notice of application for an allowance to a widow, *held* not jurisdictional. *In re Estate of Fletcher*..... 156
9. An order granting a widow an allowance is appealable. *In re Estate of Fletcher* 156
10. The statute limiting the time within which the estates of decedents shall be settled, *held* not to control provisions of a will. *In re Estate of Fletcher*..... 156
11. Under sec. 5045, Ann. St. 1907, it is the duty of the county court to appoint a special administrator. *Estate of Keegan v. Welch* 166
12. A special administrator can be appointed without notice to heirs or devisees. *Estate of Keegan v. Welch*..... 166
13. A written promise fully performed, *held* to create a debt against the estate of the promisor, and that the writing was properly received in evidence. *Russell v. Estate of Close* 232
14. Appeal *held* to present to the district court only the question of an administrator's compensation, and not to bring up the entire account for review. *In re Estate of Wilson*.. 252
15. The court in its discretion can allow an administrator reasonable compensation for legal services performed by him. *In re Estate of Wilson*..... 252
16. Administrator *held* entitled to compensation for extraordinary services. *In re Estate of Wilson*..... 252
17. On appeal in the district court the claim of an administrator for compensation should be tried by the court. *In re Estate of Wilson* 252
18. An executor cannot hold devised lands in trust, unless the testator created in him a trust estate, or a trust is necessary to carry out his intentions. *In re Estate of Buerstetta*, 287
19. Evidence *held* insufficient to require reopening of executor's final accounts. *In re Estate of Greenwood*..... 429
20. Adult heirs, who received as part of their share of an estate money from an administrator's sale of real estate,

Executors and Administrators—Concluded.

- cannot sue to set aside the sale on the ground that the land was a homestead. *Mote v. Kleen* 585
- 21. It is the duty of an executor, on giving a bond conditioned to pay debts and legacies, to surrender possession of property specifically devised to another. *In re Estate of Pope*.. 723
- 22. Where, on appeal to the district court, it is stipulated that no question will be raised as to whether a claim is a personal or official liability of an executor, the supreme court will not disturb a judgment allowing the claim, on the ground that an action should have been brought against the executor. *In re Estate of Pope*..... 723

Forcible Entry and Detainer.

- 1. In an action on a supersedeas bond in forcible entry and detainer, plaintiff cannot recover according to a lease for the preceding year, but only a reasonable rent. *Kendall v. Uland* 527
- 2. In an action on a supersedeas bond in forcible entry and detainer, evidence of tenant's reasons for refusing possession held irrelevant, and allegations with reference thereto properly stricken from the petition. *Kendall v. Uland*..... 527
- 3. In an action on a supersedeas bond in forcible entry and detainer, allegation concerning a lease for the preceding year held properly stricken from petition as an attempt to plead evidence, though the lease is admissible as evidence. *Kendall v. Uland* 527

Fraud.

- 1. In an action for fraud, an instruction that plaintiff must establish that a promise was made deceitfully with intent to defraud, held not to impose too great a burden on plaintiff. *Cerny v. Paxton & Gallagher Co.*..... 88
- 2. In an action by mortgagor against mortgagee for the difference between the price at which the goods sold and their market value, on the ground that the mortgage was obtained by fraud, held not error to instruct the jury to consider the value of the stock if sold in bulk, and not at retail. *Cerny v. Paxton & Gallagher Co.*..... 88

Fraudulent Conveyances.

Fraud is not presumed from the mere fact that an insolvent debtor assigns property or pays money to his attorney for services rendered or to be rendered. *Yeiser v. Broadwell*.. 302

Habeas Corpus.

Irregularities in proceedings before a justice committing a recusant witness cannot be reviewed upon habeas corpus. *In re Hammond* 636

Highways.

1. A public highway established under sec. 3, ch. 47, laws 1866, includes land to the full width required by the statute, and that the petition and order establishing the highway do not mention its width, *held* immaterial. *Taylor v. Austin*, 581
2. Neither petitioner for a highway nor his grantees can complain that notice of the time for presenting the petition to the county board was not given. *Taylor v. Austin*..... 581
3. A party cannot acquire prescriptive title to a public highway. *Taylor v. Austin*..... 581

Homestead.

1. A widow need not account to the estate of her husband for rents of the homestead accruing subsequent to his death. *In re Estate of Fletcher*..... 156
2. Mortgage on homestead *held* not the result of the free will and voluntary action of the wife. *Nebraska Central B. & L. Ass'n v. McCandless* 536
3. The sole deed of a married man conveying his homestead and other lands is void as to the homestead estate, but valid as to the other lands. *Wilson v. Wilson*..... 562
4. Where an oral agreement between parents and son, that when the parents died the son should have certain lands, was *held* valid except as to a homestead, which was afterwards conveyed to a daughter, *held* that the homestead should be appraised as of the date of the oral agreement. *Teske v. Dittberner* 701
5. The undivided half interest of a husband in lands owned by himself and wife as cotenants is subject to homestead exemption. *First Nat. Bank v. McClanahan*..... 706
6. Where a husband deserts his wife, leaving her in possession of homestead, she is entitled to it as it existed at the time of his desertion. *First Nat. Bank v. McClanahan*..... 706
7. Striking answer of wife to petition of judgment creditor under sec. 6 of the homestead act (Comp. St. 1907, ch. 36), *held* error. *First Nat. Bank v. McClanahan*..... 706
8. In a suit by a divorced woman to quiet title to the former homestead, *held* that the court may subject the property to her lien for alimony by canceling a void deed, where the pleadings and proof warrant such relief. *Kimmerly v. McMichael* 789
9. A mortgage on a homestead, neither signed nor acknowledged by the wife, is void. *Kimmerly v. McMichael*..... 789

Homicide. See CRIMINAL LAW.

Indictment and Information.

1. Where two or more counts are properly joined, and there is evidence tending to prove each, the state will not be required to elect on which it will rely. *Poston v. State*..... 240
2. Where an information contains three counts referring to the same transaction, defendant *held* not prejudiced if, before he introduces any evidence and as soon as brought to the court's attention, it compels the state to elect. *Lillie v. State* 268

Injunction. See NUISANCE, 3-6.

Insane Persons.

Evidence, in a suit by the guardian of an incompetent to set aside his ward's conveyances made before the guardian's appointment, *held* to sustain validity of the conveyances. *Gutru v. McVicker* 555

Insurance.

1. Where a benefit association has not complied with sec. 1, ch. 47, laws 1897, its governing body cannot adopt a constitution or by-law changing the terms of a certificate. *Johnson v. Bankers Union of the World* 48
2. Where the constitution and by-laws of a benefit association are changed, increasing the monthly assessments, *held* that the society, in settling with a beneficiary, may deduct the difference between the assessment in force when the certificate was issued and the increased rate from the time it went into effect until the member's death, but not for the remainder of his life expectancy. *Johnson v. Bankers Union of the World* 48
3. Where a beneficiary surrenders his policy under an agreement that the company will pay the full amount thereof or return it, and the company retains the policy, remitting only a portion of the amount, *held* the amount paid is a partial payment, and the beneficiary may sue for the remainder. *Bergeron v. Modern Brotherhood of America*.... 419
4. Filling in a receipt signed in blank on the back of a policy for less than the amount agreed to be paid thereon will not relieve an insurance company of its full liability under the agreement. *Bergeron v. Modern Brotherhood of America* 419
5. Where a policy was surrendered under an agreement that the company would pay or return it, *held* that retention of the policy was a ratification of the agreement, and a waiver of all defenses existing prior thereto. *Bergeron v. Modern Brotherhood of America*..... 419

Insurance—Concluded.

6. Statement in proof of loss as to cause of death of insured may be contradicted in an action on the policy, unless there is equitable estoppel. *Hart v. Knights of the Maccabees of the World* 423
7. A fraternal insurance company cannot have the benefit of by-laws and amendments thereto as a defense, unless certified copies thereof were filed with the auditor of public accounts. *Hart v. Knights of the Maccabees of the World*.. 423
8. The burden is on defendant to establish a plea of forfeiture based on false representations in an application for insurance. *Higgins v. Supreme Castle of the Highland Nobles* 504
9. Forfeiture of insurance policy will not be declared because of misstatements in application written by agent of the insurer, where the facts were truthfully stated by applicant. *Higgins v. Supreme Castle of the Highland Nobles*.. 504
10. Only those interested in an insurance contract can enforce it. *Stanistics v. Hartford Fire Ins. Co.*..... 763
11. Beneficiary *held* proper party to sue for failure of insurer to issue policy. *Carter v. Bankers Life Ins. Co.*..... 810
12. An action against a domestic insurance company may be brought in any county where the cause of action arose, and summons may issue and be served in any other county. *Carter v. Bankers Life Ins. Co.*..... 810
13. Under the facts, *held* that a contract of insurance existed, though no policy was issued. *Carter v. Bankers Life Ins. Co.* 810
14. Where insurer refuses to issue a policy as required by the terms of an oral contract, an action for damages may be maintained by the beneficiary. *Cartér v. Bankers Life Ins. Co.* 810
15. Sec. 15, ch. 52, laws 1903, requiring life insurance policies to be signed by certain officers, *held* to apply only to companies formed thereunder. *Carter v. Bankers Life Ins. Co.*.. 810

Intoxicating Liquors. See APPEAL AND ERROR, 16, 28. CRIMINAL LAW, 11, 13.

1. A movable screen in a saloon which obstructs a view of the interior is a violation of sec. 7179, Ann. St. 1907. *Woods v. Varley* 19
Woods v. Krivohlavek 23
2. One who during the previous year had obstructed his doors or windows by screens, *held* not a proper person to receive a liquor license. *Bolton v. Becker*..... 21

Intoxicating Liquors—Continued.

3. Where it is proved that applicant for a liquor license has within a year sold or given liquor to a minor, his application should be denied. *Williams v. Phillips*..... 105
4. A corporation may be licensed to sell intoxicating liquors at wholesale, but not at retail. *Rohrer v. Hastings Brewing Co.* 111
5. Under sec. 25, ch. 50, Comp. St. 1907, the signers of a petition for a liquor license must be *bona fide* freeholders. *Powell v. Morrill* 119
6. The wife of an applicant for a liquor license, though a freeholder, is not a qualified petitioner. *Powell v. Morrill*.. 119
7. In an action for damages under sec. 7168, Ann. St. 1907, it is sufficient to plead and prove that defendant sold or gave intoxicating liquors to the person from whose act the damage arose, at or about the time of the injuries. *Davis v. Borland* 281
8. In an action against liquor dealers for loss of support by death of a person, instruction as to length of time loss will continue *held* erroneous. *Davis v. Borland*..... 281
9. In an action by a wife against liquor dealers for nonsupport by her husband, *held* competent to introduce the Carlisle table of mortality to show his expectancy of life, where permanent impairment of earning capacity is shown. *Acken v. Tinglehoff* 296
10. In an action by a wife against liquor dealers for loss of support, she may prove that necessities were furnished the family by the county and suffering of the family. *Acken v. Tinglehoff* 296
11. Liquors sold by defendant need not be the sole cause of an injury to permit a recovery. *Acken v. Tinglehoff*..... 296
12. In an action for damages against liquor dealers, where there is evidence to support the verdict, judgment will not be set aside as excessive. *Acken v. Tinglehoff*..... 296
13. In an action by a wife against liquor dealers, an instruction permitting the jury to consider permanent impairment from whatever cause, *held* not erroneous, where the uncontradicted evidence showed that it was caused solely by habitual drunkenness. *Acken v. Tinglehoff*..... 296
14. Rule 27 of the excise board of the city of Lincoln, authorizing a fine of over \$200 for a violation of the excise rules, *held* valid to the extent of \$200. *State v. Dudgeon*..... 371
15. Rules of the excise board of the city of Lincoln within its authority, duly adopted and published, are of like effect as city ordinances. *State v. Dudgeon* 371

Intoxicating Liquors—Continued.

16. Prosecution of a saloon-keeper for violation of ordinance forbidding him to keep open after 11 o'clock P. M. is a civil action and it is unnecessary to show guilty intent. *Pulver v. State* 446
17. The prohibition by secs. 11 and 20, ch. 50, Comp. St. 1907, of the sale or keeping for sale malt liquor without a license, held to apply to all malt liquors, whether intoxicating or not. *Luther v. State* 455
18. To sustain a conviction for selling or keeping for sale malt liquor, held that the state is not required to allege or prove that the liquor is intoxicating. *Luther v. State*..... 455
19. Liquor traffic in a city or village can only be carried on under city or village ordinances, but a general ordinance applicable to all cases, held sufficient. *Rosenberg v. Rohrer*, 469
20. The burden is on petitioner for liquor license to show that a sufficient number of the signers of his petition are freeholders. *Rosenberg v. Rohrer*..... 469
21. Signing petition for liquor license by councilman, held to disqualify him, and that the withdrawal of the petition and filing another without his signature did not remove the disqualification. *Rosenberg v. Rohrer*..... 469
22. Certificate of register of deeds that persons of the same names as those to a petition for liquor license were freeholders, held an insufficient identification of the parties. *Rosenberg v. Rohrer* 469
23. Certain deeds held incompetent to show that signers of petition for liquor license were freeholders at the time of signing. *Rosenberg v. Rohrer* 469
24. In an action against liquor dealers for loss of support, the wife may show that she was compelled to perform menial labor and to accept aid from the county. *Eastwood v. Klam*m 546
25. In an action against liquor dealers for loss of husband's support, evidence that "he is not able to work now like he did before he got his leg broke," held admissible. *Eastwood v. Klam*m 546
26. Under the statute (Comp. St., ch. 50), held that, in addition to loss of support, the wife may recover for medical attendance and funeral expenses. *Keeling v. Pommer*..... 510
27. A saloon keeper fined by police court for violation of city ordinance cannot appeal to the district court under sec. 324 of the criminal code. *State v. Brandt*..... 656
28. Power given to a board of fire and police commissioners by statute to license, regulate, or prohibit sale of liquors con-

Intoxicating Liquors—Concluded.

- fers the right to revoke a license upon violation of any statute, city ordinance, on reasonable rule of the board. *State v. Hctor* 690
29. A rule of the board of fire and police commissioners of South Omaha, providing that any city officer may complain of the violation of law by a licensee, does not prevent others from making complaint. *State v. Hctor* 690

Judgment.

1. Where issue has not been joined nor trial had on the merits, the doctrine of *res judicata* does not apply. *Herpolsheimer v. Acme Harvester Co.*..... 53
2. The doctrine of *res judicata* stated. *Herpolsheimer v. Acme Harvester Co.* 53
3. A court cannot enter personal judgment against a non-resident constructively served, nor can any finding touching his personal liability operate as an estoppel in a personal action subsequently brought. *Gates v. Tebbetts*..... 573
4. Where a justice overrules an objection to jurisdiction of the person, error will lie, but the ruling cannot be assailed collaterally. *Bradley & Co. v. Matley*..... 589
5. In an action by brokers for commissions, judgment held not supported by the pleadings. *Duval v. Advance Thresher Co.* 593
6. Dismissal of creditor's suit because the judgment creditor was indebted to defendant in an amount greater than the judgment, held not to extinguish the judgment. *Lashmet v. Prall* 732
7. In a proceeding to revive a dormant judgment by motion, the judgment debtor cannot plead as a defense an independent cause of action. *Lashmet v. Prall*..... 732
8. In suit by heirs to cancel deed to S. and his mortgage to M., the question of indebtedness of S. to M. was not put in issue. Held, That a provision in the decree which sought to destroy the liability of S. to M. was void. *Jarmine v. Swanson* 751
9. To vacate a default judgment under section 606 of the code, defendant must present a meritorious defense. *Sloan v. Hollowell* 762
10. Where the ground of defendant's motion to vacate a default judgment is that the petition does not state a cause of action, it will be liberally construed. *Sloan v. Hollowell*..... 762
11. In equity the relief to which plaintiff is entitled may be granted pursuant to his general prayer, where defendants

Judgment—Concluded.

understand the issue and resist his allegations by evidence.

Kimmerly v. McMichael 739

12. A judgment irregularly entered is not subject to collateral attack. *George v. Dill*..... 825

Landlord and Tenant.

Evidence held to sustain finding that a buyer purchased crops of a tenant without notice of a landlord's lien. *Shelley v.*

Tuckerman 366

Larceny.

Instruction held defective and erroneous. *Emerson v. State*, 663

Licenses.

1. City charter held not to authorize city council to exact a license tax from persons the regulation of whose compensation is not permitted. *McCawley v. State*..... 431
2. Owner of wagons kept for hire to various firms under monthly contracts, held not the owner of vehicles used for pay, nor is his compensation subject to control by the city council under the Omaha charter. *McCawley v. State*..... 431

Mandamus.

Peremptory writ of mandamus to compel a carrier to furnish cars for a shipper held properly allowed. *State v. Chicago*

& N. W. R. Co......524

Marshaling Assets.

A marshaling of securities is allowable only where the common debtor of two or more creditors is the owner of several funds out of which payment is to be made. *Cooper*

Wagon & Buggy Co. v. Irvin..... 833

Master and Servant.

1. A contract of employment may be proved by letters. *Helwig v. Aulabaugh* 542
2. Employee wrongfully discharged must make reasonable efforts to secure other employment. *Helwig v. Aulabaugh*, 542
3. In an action by an employee for wrongful discharge, an undenied allegation of the petition, stating the amount he earned elsewhere, held to present no issue for the jury. *Helwig v. Aulabaugh* 542
4. Where a village so installs a gasoline tank that it leaks and causes an explosion in which an employee of the village is injured, whether the village was negligent, held question for the jury. *Reed v. Village of Syracuse*..... 713
5. Where an explosion of gasoline followed the lighting of a match by an employee, whether he was guilty of contribu-

Master and Servant—Concluded.

- tory negligence, *held* question for the jury. *Reed v. Village of Syracuse* 713
6. The danger of an explosion of gasoline in the pumping pit of a village waterworks, of which an employee had no notice, *held* not an ordinary and obvious risk assumed by him. *Reed v. Village of Syracuse*..... 713
7. A water commissioner appointed under subd. 15, sec. 69, art. I, ch. 14, Comp. St. 1903, has general management of village waterworks, and the village owes to persons employed by him the duty to provide a reasonably safe place to work. *Reed v. Village of Syracuse*..... 713
8. Where defenses of assumption of risk and contributory negligence are relied on, *held* error to withdraw case from jury, unless such defenses are established by the clearest evidence. *Olson v. Nebraska Telephone Co.*..... 735
9. A contract by which a master seeks to impose on his servant duties and obligations which the law imposes on the master, and to relieve himself from liability for negligence, *held* against public policy, and void. *Olson v. Nebraska Telephone Co.* 735

Monopolies.

1. An indictment for violation of sec. 1, art. II, ch. 91a, Comp. St. 1907, known as the "anti-trust law," must allege that the acts complained of were in restraint of trade within this state. *Howell v. State* 448
2. Instruction that certain article of the constitution of a coal dealers' association was in itself a violation of the anti-trust law, *held* erroneous. *Howell v. State*..... 448
3. Accused *held* a member of a coal exchange and liable to a criminal prosecution if the association were criminal. *Howell v. State* 448

Mortgages.

1. An action cannot be maintained on a renewal note while a decree on the original note and mortgage is in full force and effect. *Gibson v. Gutru* 718
2. In a suit to foreclose, where there was no issue of payment, plaintiff *held* entitled to decree for full amount of debt. *Toliver v. Stephenson* 747
3. Where a mortgage was given on the homestead owned by the wife and other lots owned by the husband, and a second mortgage on the husband's lots, on foreclosure of the mortgages, a decree requiring the first mortgagee to exhaust the husband's property before the homestead, *held* proper. *Cooper Wagon & Buggy Co. v. Irvin*..... 832

Municipal Corporations.

1. The power of a village to build a jail is implied from the power granted to enforce its ordinances by fine and imprisonment. *Dunkin v. Blust*..... 80
2. A village board will be restrained from proceeding with an expenditure without the making and publication of the estimate of expenses required by sec. 87, art. I, ch. 14, Comp. St. 1907. *Dunkin v. Blust* 80
3. The mayor in cities of the second class can cast the deciding vote on an application for a liquor license in case of a tie vote of the council. *Rohrer v. Hastings Brewing Co.*.... 111
4. The mayor of a city has no power to suspend an ordinance which contains no provision in itself empowering him so to do. *Pulver v. State* 446
5. Act of March 10, 1871 (laws 1871, p. 125), conferring on county boards power to vacate streets within incorporated villages, was repealed by the act of March 1, 1879 (laws 1879, p. 193). *Van Buren v. Village of Elmwood*..... 596
6. Village warrants in excess of 85 per cent. of the current levy for the purpose for which drawn, unless there is sufficient money in the treasury to the credit of the proper fund for their payment, are void, and their payment will be enjoined at the suit of a resident taxpayer. *Ballard v. Cerney* 606
7. Sec. 8308, Ann. St. 1907, regulating the adoption of ordinances by the city of South Omaha, held not to apply to ordinances adopted by the board of fire and police commissioners. *State v. Hactor* 690
8. In the absence of a statute prescribing a manner for adoption of ordinances by a board of fire and police commissioners, any reasonable mode is sufficient. *State v. Hactor*.... 690
9. Park commissioners appointed by the mayor and city council of Omaha, held invested with all powers vested in park boards by the charter, and authorized to designate real estate for park purposes. *Shannon v. Bartholomew*..... 821
10. Appointment of appraisers of lands taken for park purposes held valid, under sec. 142 of the Omaha charter (Comp. St. 1905, ch. 12a). *Shannon v. Bartholomew*..... 821

Negligence.

1. Contributory negligence is a matter of defense, and need not be negatived in the petition. *O'Brien Co. v. Omaha Water Co.* 71
2. Where the facts as to negligence are such that reasonable

Negligence—Concluded.

minds can draw but one conclusion therefrom, the court should direct a verdict. *Davis v. Chicago, B. & Q. R. Co.*... 611

3. The question of negligence is for the court where there is no conflict in the evidence. *Olson v. Nebraska Telephone Co.*... 735

New Trial. See CRIMINAL LAW, 4, 18, 21, 22, 30-32.

1. In an action against three liquor dealers for loss of support, a verdict against two of the defendants and in favor of the third, held not alone sufficient to establish that the jury were governed by partiality or prejudice. *Eastwood v. Klam* 546
2. A new trial will not be granted for misconduct of jury, where it was known and not called to the court's attention before verdict. *Shepherdson v. Olopine*..... 764
3. A party held not entitled to a new trial for surprise occasioned by evidence, where he could have procured evidence to refute it by securing a short continuance, but does not request it. *Remington Typewriter Co. v. Simpson*..... 848

Nuisance.

1. It is essential to the right of an individual to enjoin a public nuisance that he should show special injury. *Woods v. Lincoln Traction Co.* 23
Ayers v. Citizens R. Co. 26
2. A village jail properly constructed and suitably situated is not *per se* a nuisance. *Dunkin v. Blust*..... 80
3. The right to restrain an adjoining owner from using his property as a bawdyhouse is a right belonging to the land, and that the property was so used before plaintiff purchased is no defense. *Seifert v. Dillon* 322
4. The right of an adjoining owner to restrain illegal use of property as a bawdyhouse is unaffected by lapse of time. *Seifert v. Dillon* 322
5. That municipal authorities tolerate the maintenance of a bawdyhouse constitutes no defense to a suit by a nearby owner to enjoin such maintenance where special damages are shown. *Seifert v. Dillon* 322
6. Nearby owner held to sustain special injury from use of premises as a bawdyhouse. *Seifert v. Dillon*..... 322

Partnership.

Though the sale of partner's interest to a stranger does not make him a member of the firm, the members may agree to admit him. *Gorder & Son v. Pankonin*..... 204

Payment.

Where purchaser of a note gave an ordinary bank draft therefor, payment was complete when the draft passed beyond the buyer's control. *First State Bank v. Borchers*.... 530

Physicians and Surgeons.

Ch. 97, laws 1905, providing for the examination and licensing of veterinary surgeons, *held* constitutional. *In re Barnes*, 443

Pleading. See APPEAL AND ERROR, 30, 38. DAMAGES, 1. FORCIBLE ENTRY AND DETAINER, 2, 3. SPECIFIC PERFORMANCE, 12.

1. A plea of general settlement and payment of all claims, *held* not inconsistent with a general denial. *Fitch v. Martin*, 124
2. Where the sufficiency of a pleading is not questioned by demurrer or otherwise, and a trial is had on the theory that it tenders a certain issue, if it can be construed to raise such issue, it will be held to do so. *Frederick v. Buckminster* 135
3. Where a party answers after an adverse ruling on his motion or demurrer, and goes to trial, he waives any error in such ruling. *Worrall Grain Co. v. Johnson*..... 349
4. Reply in suit to quiet title *held* not to introduce a new cause of action. *Miner v. Morgan* 400
5. A defendant who submits his defense on issues raised by the reply waives the objection that it introduces a new cause of action. *Miner v. Morgan*..... 400
6. Allowance of amendment to reply after the case was submitted, *held* not an abuse of discretion. *Higgins v. Supreme Castle of the Highland Nobles*..... 504
7. Overruling motion to require plaintiff to set out in full a copy of application for insurance, *held* without prejudice, where it is shown that defendant has the missing portion. *Higgins v. Supreme Castle of the Highland Nobles*..... 504
8. A petition in equity not attacked before decree will be liberally construed. *Kimmerly v. McMichael*..... 789
9. Overruling motion to amend petition to redeem from a tax sale so as to correctly describe the land, *held* error. *Bancher v. Lowe* 801

Principal and Agent.

1. An agent for the sale of farm machinery and twine, *held* to have power to bind his principal by a certain agreement. *Herpolsheimer v. Acme Harvester Co.* 53
2. A creditor asking one partner to consult with his copartner does not thereby make him his agent, and he is not bound by his statements. *Cerny v. Paxton & Gallagher Co.*... 88
3. Agent and principal *held* jointly liable for agent's misrepresentations. *Willard v. Key*..... 150

Principal and Surety.

1. The rule that a discharge of the principal releases the surety does not apply where one becomes surety for a person incapable of contracting. *Gates v. Tebbetts*..... 573
2. A surety on a contract is not released because plaintiff in an action thereon fails to inform the court that another party is the principal. *Gates v. Tebbetts*..... 573

Public Lands.

1. Under act of congress of March 3, 1875 (18 U. S. St. at Large, ch. 152), any party entering public lands over which a railroad survey has been extended, after approved map was filed in the district land office, took the land subject to the railroad right of way. *Moran v. Chicago, B. & Q. R. Co.* 680
2. That the profile of survey of railroad right of way was sent directly to the secretary of the interior, instead of being transmitted through the district land office, *held* immaterial. *Moran v. Chicago, B. & Q. R. Co.*..... 680

Quieting Title.

- In a suit to quiet title, certain deed *held* to convey a title paramount to liens of attachments subsequently levied. *Mahoney v. Salsbury* 488

Railroads. See WATERS, 9-11.

1. Railroad company *held* not required to inclose its right of way where it would increase danger to human life. *Burnham v. Chicago, B. & Q. R. Co.*..... 183
2. Where it plainly appeared that the safety of the employees of a railroad company required that its right of way remain uninclosed, the court should withdraw the question from the jury. *Burnham v. Chicago, B. & Q. R. Co.*..... 183
3. Contributory negligence *held* to preclude a recovery, though the railroad was not fenced as required by law. *Smith v. Union P. R. Co.*..... 198
4. The occupier of premises owes no duty to a licensee as long as he inflicts no wanton or wilful injury upon him. *Shults v. Chicago, B. & Q. R. Co.*..... 272
5. In an action against a railroad company for killing horses, an instruction as to proof requisite to a recovery *held* not prejudicial. *Fee v. Chicago, B. & Q. R. Co.*..... 307
6. A lessee of the owner and builder of a railroad is charged in law with notice of inadequate construction of a water-course, and liable for resulting damage. *Smith v. Chicago, B. & Q. R. Co.*..... 387

Railroads—Concluded.

7. Instructions in action for death *held* to have properly submitted the issues. *Wally v. Union P. R. Co.*..... 658
8. Evidence in action for death *held* to sustain verdict for plaintiff. *Wally v. Union P. R. Co.*..... 658
9. The use for agricultural purposes of the right of way of a railroad is not adverse to the enjoyment of the easement. *Moran v. Chicago, B. & Q. R. Co.*..... 680

Rape.

1. Evidence *held* insufficient to sustain conviction. *Mott v. State* 226
2. The uncorroborated evidence of complaining witness *held* insufficient to sustain conviction. *Mott v. State*..... 226

Receivers.

Where a note payable to a corporation is really owned by a third party, a receiver for the corporation may indorse it to the real owner. *Gibson v. Gutru*..... 718

Religious Societies.

1. Members of a church, having no title to its property except as members thereof, may be enjoined from using the property contrary to the determination of its governing authorities. *St. Vincent's Parish v. Murphy*..... 630
2. Decrees of governing authority as to church government are binding on local associations, and courts will not ordinarily review them. *St. Vincent's Parish v. Murphy*..... 630

Replevin.

Where an officer seizes property in attachment, and is sued in replevin by a stranger, he need not prove the attaching creditor's debt, unless the property was taken from the stranger. *Curtis-Baum Co. v. Lang*..... 728

Robbery. See CRIMINAL LAW.

Evidence *held* to sustain verdict of robbery from the person. *Foster v. State* 264

Sales.

1. Evidence in an action for price of harvester twine, *held* to sustain verdict for plaintiffs. *Herpolsheimer v. Acme Harvester Co.* 53
2. Evidence, in an action to recover the difference between the sum advanced on wheat and what it sold for, *held* to support verdict for plaintiff. *Worrall Grain Co. v. Johnson* 349
3. In an action for breach of warranty that a horse was sound, *held* that the variance between the pleading and proof was not such as to require a reversal. *McCullough v. Dunn*.... 591

Sales—Concluded.

4. In an action for breach of warranty of a horse, evidence of a witness that a certain horse was diseased *held* admissible; the horse being identified by other witnesses. *McCullough v. Dunn* 591
5. Transaction *held* not to constitute a conditional sale or lease under sec. 26, ch. 32, Comp. St. 1907. *Singer Sewing Machine Co. v. Omaha Umbrella Mfg. Co.* 619

Specific Performance.

1. Specific performance will not be enforced unless the court can clearly see on what proposition the minds of the parties met. *Stanton v. Driffkorn* 36
2. Specific performance will not be enforced unless the contract was entered into with perfect fairness. *Stanton v. Driffkorn* 36
3. Evidence *held* insufficient to establish a claim for specific performance. *Stanton v. Driffkorn* 36
4. Specific performance of a contract between the sole devisee and her children, whereby most of the property is to be distributed among the children in consideration of the dismissal of objections to the probate of the will, will not be enforced unless evidence of the contract is clear; and no presumptions will be indulged in its favor. *In re Estate of Panko* 145
5. In a suit by a partnership for specific performance of a covenant to renew a lease, *held* immaterial that at certain times during the first term other persons held an interest in the partnership. *Gorder & Son v. Pankonin* 204
6. Description in a lease which is acted on, *held* sufficiently definite to entitle plaintiff to specific performance of covenant to renew. *Gorder & Son v. Pankonin* 204
7. One is not confined to an action for damages for refusal to fulfil a covenant to renew a lease, but may enforce specific performance of the covenant. *Gorder & Son v. Pankonin* 204
8. An oral contract to adopt a child and will her property may be enforced in equity. *Peterson v. Bauer* 405
9. In a suit for specific performance of an oral contract with testator to adopt a child and will her property, certain statements of testator *held* admissible. *Peterson v. Bauer*.. 405
10. In a suit to enforce an oral contract to adopt a child and will her property, evidence *held* to show performance by the child. *Peterson v. Bauer* 405
11. Whether an oral contract to devise realty shall be specif-

Specific Performance—Concluded.

- cally enforced after performance by one party depends upon the facts of each case. *Peterson v. Bauer*..... 405
12. In suit for specific performance, sustaining general demurrer to answer, *held* error. *Benedict v. Minton*..... 782

Statute of Frauds.

1. Written memorandum of sale of lot *held* insufficient under the statute of frauds. *McCarn v. London*..... 201
2. Where by agreement between partners a new member is admitted, he acquires an interest in the partnership property by operation of law; and such transfer is not within the statute of frauds. *Gorder & Son v. Pankonin*..... 204
3. Contract of insurance in suit *held* not obnoxious to statute of frauds. *Carter v. Bankers Life Ins. Co.*..... 810

Statutes.

1. Statutes with reference to general taxes are liberally construed. *State v. Several Parcels of Land*..... 13
2. Ch. 82, laws 1907, which prohibits corporations from being interested in retail liquor traffic, *held in pari materia* with the Slocumb law (Comp. St. 1907, ch. 50). *Rohrer v. Hastings Brewing Co.* 111
3. Statutes *in pari materia* must be construed together. *Rohrer v. Hastings Brewing Co.* 111
4. Long-continued practical construction of a statute *held* entitled to considerable weight in interpreting it. *Rohrer v. Hastings Brewing Co.* 111

Street Railways.

1. A street railway company *held* guilty of negligence if it fails to give warning of the approach of its cars at a public crossing, or if it operates them at an excessive speed. *Stewart v. Omaha & C. B. Street R. Co.*..... 97
2. A pedestrian about to cross tracks of a street railway at a public crossing *held* not bound to observe the same degree of care as in crossing steam railway tracks. *Stewart v. Omaha & C. B. Street R. Co.*..... 97
3. Whether plaintiff was guilty of contributory negligence in crossing a street car track *held* question for jury. *Stewart v. Omaha & C. B. Street R. Co.*.....

Taxation. See CONSTITUTIONAL LAW, 1, 2. PLEADING, 9.

1. Certain assessment *held* valid. *Chicago House Wrecking Co. v. City of Omaha*..... 11
2. Sec. 3, art. IX of the constitution, giving to the owner or persons interested in real estate two years to redeem from

Taxation—Concluded.

tax sale, applies to judicial as well as administrative sales.

Smith v. Carnahan 667

3. Where a county, without an administrative sale, forecloses a tax lien and obtains a decree, a sale thereunder is a judicial sale not final until confirmation, and the owner has two years thereafter to redeem. *Smith v. Carnahan*.. 667

4. An order of confirmation of tax sale which does not expressly deny right of redemption will not be so construed. *Smith v. Carnahan* 667

5. On redeeming from such a judicial sale, the owner should pay the full amount of taxes and costs and 12 per cent. interest. *Smith v. Carnahan* 667

6. A purchase at tax foreclosure sale by one whose duty it was to pay the taxes operates as payment only. *Toliver v. Stephenson* 747

7. Duty of mortgagor to pay taxes follows the title, and his grantee cannot purchase at a tax foreclosure sale and defeat the mortgage. *Toliver v. Stephenson*..... 747

Trial. See APPEAL AND ERROR. BILLS AND NOTES, 1, 5. CRIMINAL LAW.

1. An error of 10 cents in computing interest, not called to the attention of the court and jury, held waived. *Nichols & Shepard Co. v. Steinkraus* 1

2. Instructions based upon the issues and evidence, if reflecting them correctly, are not erroneous. *Nichols & Shepard Co. v. Steinkraus* 1

3. An instruction broader than the pleadings held not erroneous; it being in harmony with the theory upon which both parties tried the case. *Herpolsheimer v. Acme Harvester Co.* 53

4. Requested instruction, the substance of which has been given, held properly refused. *O'Brien Co. v. Omaha Water Co.* 71

5. Where there is no evidence of contributory negligence, instructions submitting that question held properly refused. *O'Brien Co. v. Omaha Water Co.*..... 71

6. It is not error to reject an offer of proof not within the limits of the question on which the offer is based. *Pike v. Hauptman* 172

7. Instructions should be construed as a whole. *Morris v. Miller* 218

8. Where there is competent evidence to establish all of the elements necessary to a recovery by plaintiff, held not error

Trial—Concluded.

- to refuse to direct a verdict for defendant. *Russell v. Estate of Close* 232
9. An instruction to find for defendant if certain facts are proved, *held* not equivalent to a direction to find for plaintiff if any of the facts are not proved. *Fee v. Chicago, B. & Q. R. Co.* 307
10. Instruction neither within the pleadings nor the evidence *held* properly refused. *Boesen v. Omaha Street R. Co.* 378
11. Instructions should be considered together. *Boesen v. Omaha Street R. Co.* 378
12. A litigant may waive his right to have an issue submitted to the jury. *Helwig v. Aulabaugh* 542
13. Instruction as to measure of damages in an action for assault and battery *held* not prejudicial. *Fink v. Busch* 599
14. It is not error to refuse to submit a defense which is unsupported by evidence. *Fink v. Busch* 599
15. In action on note, under the uncontradicted evidence, *held* that the court properly directed a verdict for plaintiff. *Second Nat. Bank v. Snoqualmie Trust Co.* 645
16. It is not error to refuse an instruction that singles out a witness and informs the jury that she is competent to testify upon a given subject. *Soucek v. Karr* 649
17. On appeal to district court, *held* error for counsel or the court to inform the jury of the result of the trial in the lower court, and also error for the court to reprimand opposing counsel for objecting to such conduct. *Adams v. Fisher* 686
18. An instruction submitting issue regarding which there is no evidence, *held* erroneous. *Quinby v. Union P. R. Co.* 777
19. An instruction which assumed to determine all the issues, *held* not erroneous because it excluded certain defenses not supported by evidence, or which were covered by other instructions. *Hinton v. Atchison & N. R. Co.* 835

Vendor and Purchaser.

1. Where a grantee failed to record his deed, a subsequent grantee *held* protected in his title. *Chicago, R. I. & P. R. Co. v. Welch* 106, 110
2. Provision in contract for sale of land *held* to make time of the essence of the contract. *Cadwell v. Smith* 567
3. A public road on the margin of land *held* not such an incumbrance as will exempt the purchaser from payment for the land included therein. *Killen v. Funk* 622

Waters.

1. Whether the leaky condition of a hydrant indicated the defect which culminated in its bursting, *held* question for jury. *O'Brien Co. v. Omaha Water Co.*..... 71
2. In an action against a water company for flooding a cellar by the bursting of a hydrant, instructions *held* not erroneous as telling the jury that, if the hydrant was in a leaky condition, it was defective, and that the leaky condition was evidence of the defect. *O'Brien Co. v. Omaha Water Co.* 71
3. Railway company *held* bound to know that damage might result from an inadequate artificial watercourse. *Smith v. Chicago, B. & Q. R. Co.*..... 387
4. Plaintiffs *held* entitled to restrain defendants from cutting off the city water from their hotel on payment of rentals based on an approximate estimate of amount used. *Hoover v. Deffenbaugh* 476
5. Water rentals demanded by a city against hotel owners *held* unreasonable. *Hoover v. Deffenbaugh*..... 476
6. One who has not acquired right of way for an irrigation canal over the public lands prior to homestead entry must arrange for such right with the entryman or proceed to appropriate the land. *Rasmussen v. Blust*..... 678
7. Construction of irrigation canal through the public lands without consent of the government or a right of way from a homestead entryman, who allows the land to revert to the government, gives the proprietor of the canal no claim to the land against a subsequent entryman. *Rasmussen v. Blust* 678
8. Equity will not protect upper riparian owners in maintaining a dam constructed without lawful authority, and, where the evidence is conflicting as to whether a lower owner is damaged, he will be relegated to an action at law. *Radford v. Wood* 773
9. In an action for damages for the negligent damming of flood waters, certain evidence *held* admissible. *Hinton v. Atchison & N. R. Co.* 835
10. A railroad company is required to build sufficient bridges or culverts in an embankment across a valley to permit the passage of such flood waters as might reasonably be expected. *Hinton v. Atchison & N. R. Co.* 835
11. In an action against a railroad company for damages caused by flood waters, certain evidence *held* properly excluded. *Hinton v. Atchison & N. R. Co.*..... 835

Wills.

1. Unless reserved, standing crops pass by deed or devise. *In re Estate of Andersen*..... 8
2. In construing a will, courts will consider it in its entirety. *In re Estate of Buerstetta*..... 287
3. In a will contest, evidence held to support finding that testator was of unsound mind. *In re Estate of Frederick*.. 318
4. Where the district court by decree fixed the amount testator's widow should receive for maintenance under his will, held that the legal effect was the same as though that sum had been written in the will, and that she should receive it from the date of testator's death. *Smullin v. Wharton* 328
5. Where the only way of fixing the amount the widow should receive for maintenance under a will was by a suit, the same not having been previously ascertained, the taxable costs should be charged to the estate, and not against her personally. *Smullin v. Wharton* 328
6. Where, after contest, a will is admitted to probate, the reasonable attorneys' fees and expenses of testator's widow in defending the will should be charged to the estate devised and bequeathed. *Smullin v. Wharton*..... 328, 346
7. Interest on allowance for support disallowed. *Smullin v. Wharton* 328, 346
8. Widow held entitled to maintenance from the trust estate. *Smullin v. Wharton* 346
9. Unless reserved, standing crops pass to the devisee. *In re Estate of Pope* 723
10. Where land is let and rent reserved in a share of the crops, the title to the land and to the landlord's share of the crops pass by his devise of the land. *In re Estate of Pope*..... 723

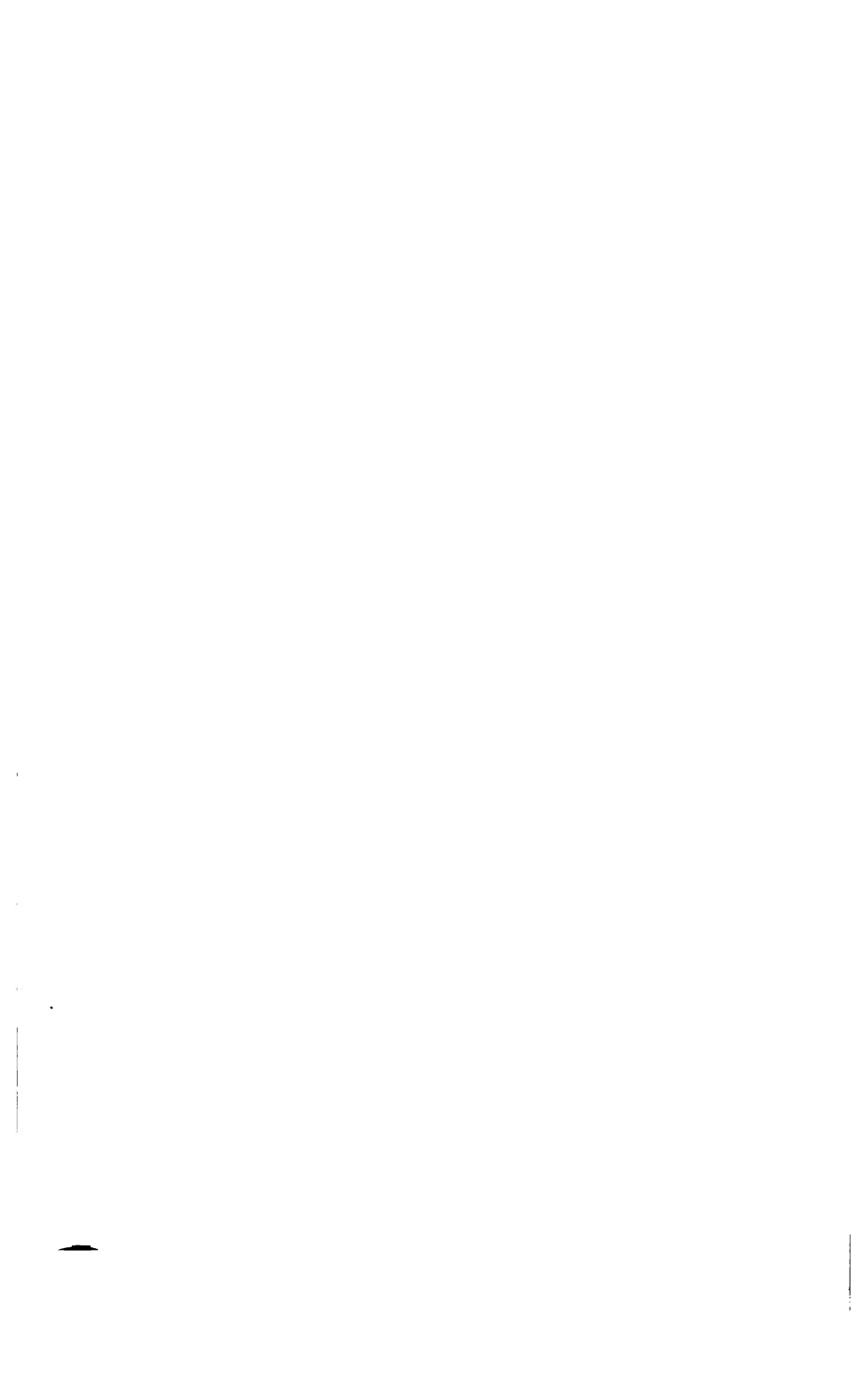
Witnesses.

1. Where a party testifies to conversations between himself and his attorney they cease to be privileged. *Cerny v. Paxton & Gallagher Co.*..... 88
2. A witness who testifies that an applicant for a liquor license is of respectable character may be cross-examined concerning specific unlawful acts of the applicant. *Powell v. Morrill* 119
3. It is not proper to interrogate a claimant against a decedent's estate on the assumption that his services were performed for the deceased. *Fitch v. Martin*..... 154
4. Where a claimant against a decedent's estate was cross-examined concerning certain entries in a diary, the admis-

Witnesses—Concluded.

- sion in evidence of entries in the diary relating to other transactions with decedent, *held* error. *Fitch v. Martin*... 124
5. Evidence in disbarment proceedings *held* not to divulge any privileged communications. *In re Watson*..... 211
 6. Where defendants introduced a part of plaintiff's evidence relating to a transaction between her and the deceased, *held* that they thereby waived the protection afforded the estate by sec. 329 of the code. *Russell v. Estate of Close*.. 232
 7. Cross-examination should be restricted to matters covered by the examination in chief. *Callahan v. State*..... 246
 8. A party claiming title under a deed made by a deceased person is incompetent to prove delivery. *Wilson v. Wilson*, 562

Ex J.H.C.
12/27/11



HARVARD.

